United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED DEC 18 1957
Joseph W. Stewart
CLERK

No. 14,975

MABEL L. MARCERON,

Appellant,

v.

CHEVY CHASE SERVICES, INC.,
A Corporation, Trading as
Chevy Chase Funeral Home,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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APPELLANT'S STATEMENT OF QUESTIONS PRESENTED

The first question is whether the lower Court erred in upholding rentals computed by a committee of appraisers under two leases where the evidence established that said committee misinterpreted the leases and adopted formulae which defeated the intention of the parties and violated recognized rules of construction.

The second question is whether the lower Court erred in failing to correct the report of a committee of appraisers where it was readily apparent from such report that the appraisers failed to apply the formulae specified in the leases and thus committed an error of law.

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UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 14,199

MABEL L. MARCERON,

Appellant,

v.

CHEVY CHASE SERVICES, INC.,
A Corporation, Trading as
Chevy Chase Funeral Home,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The appellee corporation, as lessee under two leases, filed its complaint in the District Court (App. 1-5) praying for declaratory judgment and injunction pursuant to Section 2201, Title 28, United States Code. Each of the leases (Pl. Ex. Nos. 1 and 2; App. 12-33) covers one of two adjoining lots situated in the District of Columbia. Appellant is the owner of these lots and the lessor under said leases. The appellee exercised options to extend the terms of the leases for an additional ten-year period, following which three appraisers, duly appointed as provided by the leases, appraised the total value of the lots and computed the respective rentals for these lots for the additional ten years. This

litigation arose out of the manner in which the appraisers computed the rentals after having determined the total valuation of the land.

Following trial of the case, the Court granted judgment to the lessee upholding the rentals as computed by the appraisers (App. 50). This appeal is from such judgment. Jurisdiction is conferred upon this Court by Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE

In the fall of 1944, Ernest A. Adams and James E. Betts desired to establish a funeral home. They consulted with a local real estate broker in seeking a location for the business (App. 52-54). The broker found a feasible site at the northeast corner of Wisconsin Avenue and Garrison Street, which was described as Parcel 25/66 in Square 1666 (App. 53). This parcel, with frontages on Wisconsin Avenue and Garrison Street (App. 37), raised a problem for the broker in that the District of Columbia zoning regulations precluded issuance of a permit for a funeral home on land abutting on Garrison Street because both sides of said Street were zoned residential (App. 53).

On behalf of Messrs. Adams and Betts the broker presented appellant with an offer to purchase the north 90 feet of this parcel (App. 53), which included a house (App. 55), for $40,000 (App. 53). This offer was not accepted by appellant (App. 53). A second offer to buy at a price of $42,500 was authorized by Messrs. Adams and Betts but nothing came of it (App. 54).

The broker thereafter undertook negotiations with appellant for the leasing of the north 90 feet of this parcel to Messrs. Adams and Betts for $4,000 per year and a lease was prepared along these lines by appellant's attorney (App. 53, 54). Then consideration was given to leasing both portions of the parcel for the reason that Messrs. Adams and Betts did not want any use made of the corner portion (App. 54),

which had a 17-foot frontage on Wisconsin Avenue (App. 37), as it would obstruct the view of the north 90 feet and make that site less impressive (App. 54).

The $4,000 rental for the entire property was arrived at by figuring the ground as being worth $2.50 per square foot for a total valuation of $43,560. This rental represented an 8 per cent return to appellant as owner of the property plus real estate taxes and an allowance for any increase thereof, all of which were to be paid by the landlord during the first ten-year period (App. 54).

Subsequent negotiations were had concerning the renewal clause which provided for an appraisal to be made and the renewal rent determined on the basis of an 8 per cent return to the landlord based on such appraisal (App. 54, 55). Since the inside portion of the parcel had a house on it and as Messrs. Adams and Betts intended to remodel the house and did not want the increased value resulting from the remodeling to be included in the appraised value, it was agreed that a set value of $7,000.00 would be placed on the house and added to the appraised value of the land (App. 55).

During the period of these negotiations the leases were submitted to the attorneys for Messrs. Adams and Betts. It was suggested that Messrs. Adams and Betts would not be very secure unless they had some direct control of the corner lot (App. 55). It was then decided that the property be divided and two different leases made, with the rental divided between the two properties (App. 55). The subdivision was undertaken for the convenience of Messrs. Adams and Betts (App. 47, 57). It enabled them to apply for a permit to operate the funeral home without regard to the zoning provisions applicable to the land abutting on Garrison Street. (App. 57). The appellant was reluctant to subdivide the property as she was fearful a disadvantage would result to her. She insisted that each lease be dependent upon the other, and if one was vitiated, then the other should be vitiated. Appellant wanted the properties tied together so as to maintain the

value of the entire parcel (App. 57).

A survey of the parcel was obtained (App. 37, 55) and application was made to the District Surveyor's Office for preparing a plat of the subdivision (App. 55). The plat was thereafter held in abeyance for the reason that appellant did not want the property subdivided and then find she didn't have a tenant (App. 55). Leases for the two portions of the parcel, describing the ground by metes and bounds, were signed by the lessees only, on August 17, 1945 (App. 55, Def. Ex. Nos. 4, 5). The rent division under these leases was $3,200 for the north 90 feet of the parcel and $800 for the corner portion, which was an 80%-20% division of the total $4000 annual rental (App. 55).

After Messrs. Adams and Betts signed the leases on August 17, 1945, the parcel was subdivided (App. 55). The subdivision was recorded on September 28, 1945 (App. 55), providing for a division of the parcel into lots 1 and 2, lot 2 being the north 90 feet thereof (App. 56). New leases were then prepared by the real estate agent from the draft furnished to him by the owner's attorney (App. 56). The leases were executed on October 15, 1945, stipulating an annual rental of $800 for lot 1 and $3,200 for lot 2 (App. 12, 22).

On August 3, 1950, with the consent of appellant, the leases were duly assigned by Messrs. Adams and Betts to appellee corporation (Pl. Ex. Nos. 3, 4). Mr. Betts is a stockholder in, and president and treasurer of, said corporation (App. 52). The leases give the lessee the option to renew for two additional terms of ten years each, at a rental to be computed by a committee of appraisers, in accordance with the formulae set forth in the leases (App. 43, 48, Pl. Ex. Nos. 1, 2). By letter dated January 29, 1955, appellee notified the appellant it was exercising its option to renew the leases for the first additional ten-year term (Pl. Ex. No. 5, App. 44, 48). As provided by the leases, each party appointed an appraiser, and the two so appointed selected a third to form the committee of appraisers. All three of the appraisers

were experienced and respected real estate dealers (App. 48).

With regard to the computation of the rentals by the committee of appraisers, the leases provide, in pertinent part, as follows:

Lease for lot 1 - paragraph 3 (App. 14) —

> "The appraisers shall determine the then fair market value of the leased premises, including the ninety (90) foot wide lot abutting the North line of the ground demised under this lease, upon the assumption that the said abutting lot is subject to no restriction upon its use, for its most advantageous use or uses, and upon the further assumption that the land has no buildings or structures up on it. The rental for the ensuing ten (10) year period shall then be determined by the appraisers based upon a return to the lessor of eight per centum (8%) net per annum upon 20% of the appraised value of the land over and above real estate taxes." (Pl. Ex. No. 1, App. 14).

Lease for lot 2 - paragraph 3 (App. 24) —

> "The appraisers shall determine the then fair market value of the leased premises for its most advantageous use or uses, including the lot at the corner of Garrison Street and Wisconsin Avenue, Northwest, upon the assumption that said corner lot is in the same ownership as the leased premises and can be jointly used therewith for any lawful use or uses, and that said lot is subject to no restriction upon its use, and upon the further assumption that the land has no buildings or structures upon it, and shall add to such land value the sum of Seven Thousand Dollars ($7,000.00) as the assumed value of the building or buildings upon the land irrespective of the value of such structures or whether or not they then exist. The rental for the ensuing ten (10) year period shall then be determined by the appraisers based upon a return to the lessor of eight per centum (8%) net per annum upon 80% of the appraised value of the land plus $7,000.00 over and above real estate taxes." (Pl. Ex. No. 2, App. 24).

The report of the appraisers (Pl. Ex. No. 7, App. 38), states in pertinent part, as follows:

"After diligent study of the present fair market value of lots 1 and 2 Square 1666, upon the assumption that they are in the same ownership and have no buildings or structures upon them, we have unanimously agreed that the overall valuation of the 17,480 square feet involved is $109,909.00. Of this we allot $7.00 per square foot or $35,203. to lot 1 (the corner) and $6.00 per square foot or $74,706 to lot 2.

Applying to these figures the prescribed rental formula we have

Lot (1)

20% of $35,203 ($7040.60) capitalized at 8% = $563.24 per annum or $46.93 per month, *

* lease prescribes $66.66 per month minimum,

Lot (2)

80% of $74,706 ($59,764.80) plus $7000 for improvements = $66,764.80. This capitalized at 8% is $5341.18 per annum or $445.09 per month."

The appellant refused to accept the rentals fixed by the appraisers, contending they were incorrectly computed (App. 45). Appellant's attorney so advised the committee of appraisers by letter on October 17, 1955 (App. 39). The committee of appraisers answered by letter of October 19, 1955 (App. 41), stating in part, as follows:

". . . we thought we had made it clear in our report that the present fair market value of the 17,480 square feet involved (Lots 1 and 2 appraised as one parcel in one ownership) was in our judgment $109,909.00. Only for the purposes of clarification and/or enlightenment did we break this down to $7.00 per square foot for the area of the corner (lot 1) and $6.00 per square foot for the interior (lot 2).

"After repeatedly reading the leases, it was our interpretation both individually and collectively that in establishing rental value we were compelled to apply the following formula. ---"

"Obviously if our interpretation of the leases is in error and your interpretation can be maintained then the formula would be as follows:

Lot (1)

20% of $109,909.00 ($21,981.80) capitalized at 8% = $1758.54 per annum or $146.55 per month.

Lot (2)

80% of $109,909.00 ($21,927.20 (sic) plus $7000 for improvements a total of $94,927.20 capitalized at 8% = $7594.17 per annum or $632.84 per month."

Thereafter, Mr. Frank M. Doyle, one of the appraisers, stated in a separate letter to appellant's attorney, dated November 25, 1955 (App. 42, 43), in part, as follows:

"I and the other 2 appraisers appraised the value of lots 1 and 2 according to our interpretation of the leases and arrived at the same construction of the leases. We were concerned when we noticed that the new rental of Lot 1 would be less than the existing amount. It was my opinion that the lease must have meant 20% and 80% of the total, for they had to be in relation to each other, since 100% represents the whole of anything. Therefore, we had discussed the desirability of including in our appraisal what we thought was intended, together with our interpretation. . . . ".

As a result of the refusal of appellant to accept the rental fixed by the appraisers, appellee corporation filed its complaint in the lower Court (App. 1-5), for a declaratory judgment and injunction praying for, inter alia, a declaration of its rights with respect to said leases of October 15, 1945. Appellee corporation has continued in possession of the premises (App. 52). Appellant's answer to the complaint was thereafter filed averring that the appraisers did not compute the rentals in accordance with the formulae in the leases and praying for appropriate relief in the circumstances (App. 5-11).

Following trial, the lower Court filed its opinion herein on June 7, 1957 (App. 43-47). Findings of fact and conclusions of law were made by the Court (App. 48-50), and the judgment, which upheld the rentals at the rates computed by the appraisers, was entered in favor of appellee corporation on June 28, 1957 (App. 50).

This appeal is taken from the aforementioned judgment.

For convenience, appellant has set forth in an Appendix to her brief at page 23, the rental computations as reported by the appraisers and as contended for by appellant, both of which are based upon the $109,909 valuation for the property as determined by the appraisers.

STATEMENT OF POINTS

1. Where the evidence established that the formulae adopted by a committee of appraisers in computing rentals under two leases defeated the intention of the parties and violated recognized rules of construction, it was error for the Court to uphold such rental computations.

2. The lower Court erred in failing to correct the report of a committee of appraisers where it was readily apparent from such report that the appraisers failed to apply the formulae specified in the leases and thus committed an error of law.

SUMMARY OF ARGUMENT

The rules applicable to the interpretation of leases make it necessary to give effect to the intention of the parties and to give a reasonable meaning to all of the lease provisions. In the instant case, the computation of the rentals by the appraisers, which were upheld by the lower Court, violated these rules.

The intention of the parties is clearly established from the evidence. The parties to the leases being represented by counsel held

numerous conferences and considered drafts of various leases over the course of many months. At the insistence of the lessees and for their protection, the parties agreed to subdivide the parcel into lots 1 and 2, and to divide the previously agreed annual rental of $4,000 between the lots in the ratio of 20% - 80%, or $800 for lot 1 and $3,200 for lot 2. The leases were entered into on such basis. Hence the intention of the parties, as evidenced by these negotiations and as derived from the language of the leases, required that the appraisers determine in each case, the value of the leased premises, including the other lot, of the two lots constituting the original parcel. After arriving at the $109,909 appraised land value, the appraisers should have applied the same 20% - 80% ratio to such total value in computing the respective rentals, that is, as stated in paragraph 3 of the leases, "20% of the appraised value of the land" for lot 1 and "80% of the appraised value of the land plus $7,000.00" for lot 2.

Instead of adopting such formulae and thus carrying out the intention of the parties, the appraisers selected their own method for computing the rentals, in that they allotted separate values to each of the two lots on a square foot evaluation basis, and then took 20 per cent of the value allocated to lot 1 and 80 per cent of the value allocated to lot 2, in computing the respective rentals. This allocation of separate values to each lot by the appraisers was in direct violation of the language of the leases and had the effect of omitting from consideration certain portions of paragraph 3 of each lease. Therefore, the interpretation of the lease provisions by the appraisers and the lower Court, failed to give effect to the intention of the parties and conflicted with the rule of construction that a reasonable meaning must be given to all of the lease provisions.

As a corollary proposition, the principle of law that doubtful language in a lease will be construed most strongly against the grantor has no application where the leases admit of only one reasonable

construction, and moreover, if otherwise applicable, such principle is of a secondary nature and should have but slight force where both parties were represented by counsel as in the circumstances of this case.

Appellant does not challenge the total valuation of the land in the sum of $109,909 as found by the appraisers, recognizing that such value constitutes a finding of fact. The appraiser's interpretation of the lease provisions, however, in allotting separate values to each lot and in applying unauthorized formulae to compute the rentals are based upon a manifest error of law which is readily apparent from their report. Under the applicable decisions this error should have been corrected in the Court below and can be corrected by this Court.

Appellant accordingly submits that the judgment of the lower Court is in error and should be reversed.

ARGUMENT

1. Where the Evidence Established That The Formulae Adopted by a Committee of Appraisers in Computing Rentals Under Two Leases Defeated The Intention of The Parties And Violated Recognized Rules of Construction, It Was Error For The Court to Uphold Such Rental Computations.

The basic issue presented in this case is that of interpreting the two leases. In considering this question, it is essential that effect be given to the intention of the parties and that a reasonable meaning be accorded to all of the lease provisions.

In support of appellant's contention, reference is made first to Stinson v. New York Life Insurance Co. (1948), 83 App. D.C. 115, 117, 167 F. (2d) 233, wherein this Court observed, in construing a policy of life insurance, as follows:

> "We face the necessity of interpreting a contract. Our sole duty is to find out what was intended by the parties according to the expressed or apparent intent manifested by the language employed, and give effect to that intention if it can be done consistently with legal principles. In attempting to judicially determine the probable intent of the parties, consideration is directed to the purpose of the contract and the circumstances surrounding its execution. ---"

Another holding bearing on the issue is that of Roper et al v. Capital View Realty Co. (1939), 71 App. D.C. 105, 107 F. (2d) 833, wherein this Court observed that a contract should be interpreted so as to give reasonable meaning to all of its provisions.

In the case of Chicago Auditorium Association v. Corporation of Fine Arts Building (1910), 244 Ill. 532, 91 N.E. 665, which involved the interpretation of leases on a question similar to that raised in the instant case, the Court said, at pages 667, 668, as follows:

> " -- The same rules of law are applicable to the construction of leases that are applicable to the construction of other contracts, and where the language of a lease is the subject of construction, the object to be attained is to ascertain, if it can be done, the intention of the parties to the instrument and to give effect to that intention. ----"

The Court then went on to quote from Street v. Chicago Wharfing and Storage Co., 157 Ill. 605, 614, 41 N.E. 1108, 1111, as follows:

> " 'The Court will, if necessary, put itself in the place of the parties and read the contract in the light of the circumstances surrounding them at the time it was made and of the objects which they then evidently had in view. So, also, the acts of the parties themselves, indicative of their construction placed upon it, may be resorted to for the purpose of determining the true meaning of the written agreement. And in this regard it makes no difference whether such acts are contemporaneous or subsequent.' "

Again, in the Chicago Auditorium Association case, the Court said, at page 668 -

> "Preliminary negotiations may be considered for the purpose of determining the meaning and intention of the parties in the use of the words employed in the instrument, but not for the purpose of varying or contradicting the plain terms of the instrument."

Thus we reach the stage where it is necessary to consider the negotiations preceding the signing of the leases and to inquire into the intention of the parties as disclosed by the evidence. The questions raised in this connection are, (1) have the appraisers and the Court below fully considered the intention of the parties and (2) has reasonable meaning been given to all of the provisions of the leases? Appellant answers these questions in the negative, contending that the Court's ruling not only defeats the intention of the parties, but further, it sanctions an interpretation by the appraisers as to the rental computations contrary to the reasonable and logical meaning of the lease provisions and violates the previously cited rules of construction.

Considering briefly the action of the appraisers, it is apparent from their report that they had no knowledge of the negotiations regarding the leases nor of the parties' intention with respect thereto, nor does it appear that the appraisers were aware of the reasons for subdividing the parcel into lots 1 and 2. Whatever impression the appraisers had as to the intention of the parties, it obviously was disregarded when they interpreted the leases and selected their own method for computing the rentals, since Mr. Doyle, one of the appraisers, stated in his letter that "-- we had discussed the desirability of including in our appraisal what we thought was intended, together with our interpretation" (App. 42).

In reviewing the lease provisions and the evidence in this case, it may be observed at the outset, that the testimony is not disputed and the parties are in agreement as to the steps taken which led to the signing of the leases. The evidence shows clearly that the initial negotiations all pertained to the north 90 feet of the parcel. The first attempt

made was to purchase the groundfrom appellant and that failing, further negotiations were had relative to leasing it. Then, after a time, Messrs. Adams and Betts decided they needed the corner portion of the parcel to protect the north 90 feet so negotiations were directed towards leasing the entire parcel. After the attorneys for Messrs. Adams and Betts reviewed drafts of the leases, they proposed that the parcel be subdivided so as to give the lessees greater assurance of obtaining a permit for establishment of a funeral home on what ultimately became lot 2. In this connection, the trial judge stated in his memorandum opinion that the "evidence was clear that the two lots constituted one parcel of real estate and that the defendant had always considered it one parcel and wished to continue to consider it as such. The division into separate lots was made for the convenience of the lessees in order to meet requirements of the zoning regulations of the District of Columbia" (App. 47).

It may be noted, based upon the evidence supporting the above-quoted statement of the Court, that if it had not been for the obstacle raised by the zoning regulations, the property would never have been divided. And in such event, the land valuation of the appraisers for the parcel as a whole, namely, $109,909 would have been used in computing the rental, and the total rental would thus have been the amount which appellant claims under these leases, as set forth in the Appendix to appellant's brief, page 23 hereof.

In the early stages of the negotiations the value of the parcel was fixed at $43,560 and the annual rental agreed upon by the parties was $4,000. As a result of later negotiations the parties agreed to subdivide the parcel and to divide the annual rental between the two lots on a 20% - 80% basis, that is, $800 for lot 1 and $3,200 for lot 2.

It seems abundantly clear from both the testimony and the language of the leases, that the renewal rentals were intended by the parties to be on a level commensurate with "the then fair market value of the leased premises," as expressed in paragraph 3 of each lease (App. 14,

24). It follows, therefore, that the original 20% - 80% rental division should have been applied to the total land value in computing the respective renewal rentals, that is, again as stated in paragraph 3 of the leases, "20% of the appraised value of the land" for lot 1 and "80% of the appraised value of the land plus $7,000.00" for lot 2. The "appraised value of the land" as specified in paragraph 3 of each lease can only mean the value of the leased premises, including therewith the other lot constituting the original parcel. Had this intention of the parties been recognized and adopted by the appraisers in making their rental computations, the result would have been to fix the rentals in the amounts claimed by appellant. Instead the appraisers adopted formulae of their own and arrived at rentals which fall far short of the mark intended by the parties.

The intention of the parties conclusively establishes that appellant was to receive as rent an 8% return on the fair market value of the property. Therefore, appellant should now receive a total annual rental under both leases equal to 8% of $109,909 plus $7,000. The appraisers' computation results in an 8% return on a $66,805.40 land value plus $7,000.

The disparity between the rental level intended by the parties and as arrived at by the appraisers may be readily observed. In the ten-year period between the original leasing and the renewing of the leases in 1955, the total value of the land increased by more than 2-1/2 times, from $43,560 to $109,909. The annual rental for these properties as computed by the appraisers increased from $4,000 to only $5,904.42, although by reason of the minimum rental provisions contained in the leases, the actual rental to be paid annually is $6,141.18, to which must be added the amount of the real estate taxes, since the lessee is to pay such taxes during the renewal term. Including taxes, the total to be paid by lessee annually is $6,730.38. This latter amount is 1.7 times the initially agreed rental, whereas, the corresponding increase in the land value over the ten-year period, as noted above,

exceeded 2-1/2 times the 1945 value. It is interesting to observe on this aspect of the case, that 2-1/2 times the original rental equals $10,000 which figure compares favorably with $9,941 representing the amount of the renewal rental ($9,352) as contended for by appellant, plus real estate taxes.

Another consideration shedding light on the intention of the parties is contained in paragraphs 22 and 25 of the respective leases. It is therein provided that in the event either lot 1 or lot 2 be repossessed by the lessor as a result of default in the rental or by reason of a violation of any of the provisions of the leases, or from failure to renew, under either lease, then the lessor has the right, upon the giving of sixty (60) days' notice in writing to the lessee, to cancel the other lease (App. 20, 21, 31).

The formulae to be applied by the appraisers in computing the renewal rentals are set forth in paragraph 3 of the leases. In each case the appraisers are to determine first, the then fair market value of the leased premises, <u>including therewith the other lot contained in the original parcel</u>. The appraisers did this in finding the fair market value of the land to be $109,909. The appraisers are then directed to determine the rental by assigning to lot 1, 20% of the total appraised value of the land, to wit, 20% of $109,909, and to lot 2, 80% of the total appraised value of the land, to wit, 80% of $109,909 plus the $7,000 allowance for the building, specified in the lease for lot 2. This the appraisers failed to do.

They allotted "$7.00 per square foot or $35,203 to lot 1 (the corner) and $6.00 per square foot or $74,706 to lot 2" (App. 38), and used these values to compute the renewal rentals. The appellant contends these allocations were in direct violation of the lease provisions. The unequivocal mandate to the appraisers was to determine under each lease, the value of the leased premises, <u>including the other lot</u>, of the two lots constituting the original parcel and to apply the 20% -

80% ratio to the total "appraised value of the land" in computing the respective rentals.

This error of the appraisers in allocating a separate value to each lot and then reducing the value by 20% and 80%, respectively, is further emphasized by the statement contained in the appraisers' letter to appellant's attorney of October 19, 1955 (App. 41). In that letter, the appraisers said -

> "After repeatedly reading the leases, it was our interpretation both individually and collectively that in establishing rental value we were compelled to apply the following formula.
>
> Lot (1)
> 20% of $35,203 ($7040.60) capitalized at 8% = $563.24 per annum or $46.93 per month *
> * lease prescribes $66.66 per month minimum.
>
> Lot (2)
> 80% of $74,706 ($59,764.80) plus $7,000 for improvements = $66,764.80. This capitalized at 8% is $5341.18 per annum or $445.09 per month."

It is submitted that the leases are totally devoid of any language directing the appraisers to follow the formula which they applied. Furthermore, the method used by the appraisers ignores completely that portion of the previously quoted provisions of paragraph 3 of each lease, which reads - as to lot 1 -

> "including the ninety (90) foot wide lot abutting the North line of the ground demised under this lease",

and for lot 2 -

> "including the lot at the corner of Garrison Street and Wisconsin Avenue, Northwest."

Accordingly, the appraisers' interpretation of the leases is in direct conflict with the holding of this Court in Roper v. Capital View Realty Co., supra, wherein it was stated that a contract should be interpreted

so as to give reasonable meaning to all of its provisions.

In summarizing, appellant submits that the provisions of the leases themselves, coupled with the circumstances which led to their signing, necessitate that the leases be read together. Then, considering the purpose and intention of the parties and after giving a reasonable interpretation to all of the leases' provisions, we reach the unmistakable conclusion that paragraph 3 of each lease required the appraisers to determine the total value of the land and to compute the rentals therefrom on the basis of the same 20%-80% ratio as was agreed upon by the parties for the initial ten-year term. In the circumstances of this case no other procedure is consistent with the language of the leases, and certainly the allocation method used by the appraisers is repugnant to the express directions of the leases.

Another facet to be considered on the issue of interpreting these leases comes about by reason of the reference in the opinion of the lower Court to the holding in the case of Nicolopole v. Love (1912), 39 App. D. C. 343. The rule therein announced, at pages 349, 350, was to the effect that "where a contract will admit of two constructions, either of which is reasonable, the one most favorable to the grantee must be adopted, on the principle that a man's grant shall be construed most strongly against himself".

Appellant contends that such rule has no application to the instant case for several reasons. First, the leases do not admit of two reasonable constructions, for as already pointed out, the procedure followed by the appraisers not only fails to give a reasonable construction to the lease provisions, but it leads to an absurd result. Furthermore, the procedure adopted by the appraisers violates a fundamental rule of construction applicable in a case of this kind, since certain clauses of paragraph 3, as quoted above, were omitted from consideration by the appraisers in computing the rentals.

Finally, in contending that the rule of the Nicolopole case is not applicable, reference is made to International Harvester Co. v. Mississippi Land Co. (1930), 43 F. (2d) 17. There, the Court stated, at pages 21 and 22, as follows:

> "--- While drawn by the land company's counsel, both parties, through their counsel, participated fully in the consideration thereof, so that the language of the lease is the language of both parties, and there should be no presumption under these circumstances indulged that the lease should be construed more strictly against the lessor."

And in the case of Rossi v. Douglas (1953), 203 Md. 190, 100 A. (2d) 3, 6, on this same question, the Court said the following:

> "The rule that doubtful language is to be interpreted against the party who drafted the instrument is only a secondary rule of construction and perhaps should have but slight force in a situation where both parties are represented by counsel. ---"

The evidence in the instant case clearly shows that the negotiations were carried on over the course of many months, that both parties were represented by counsel, that numerous conferences were held by the parties regarding the property and in considering drafts of the leases, and finally, that the attorneys for Messrs. Adams and Betts were instrumental in bringing about the subdividing of the parcel, which preceded the signing of the leases in final form.

In concluding on this issue, appellant contends the ruling of the lower Court failed to take into account the intention and purpose of the parties. Appellant says also, that the lower Court erred in upholding an interpretation of the lease provisions which violated established rules of construction. Accordingly, appellant submits that the judgment entered in this cause by the Court below should be reversed.

2. The Lower Court Erred in Failing to Correct the Report of a Committee of Appraisers Where It Was Readily Apparent from Such Report That the Appraisers Failed to Apply the Formulae Specified in the Leases and Thus Committed an Error of Law.

The power of the Court to correct the report of the appraisers was considered by the lower Court. In this connection it is pointed out, that the provisions of paragraph 3 of each lease specify that a determination in writing by a majority of the appraisers shall be binding upon the lessee and lessor as to the rental value of the leased premises.

Appellant's position with respect to the appraisers' report is that the lessor and lessee are bound by the portion thereof which constitutes findings of fact. As a consequence appellant does not challenge the total land valuation of $109,909 as found by the appraisers for lots 1 and 2. However, appellant contends that the portion of the report pertaining to the allocation of individual values to lots 1 and 2 in the respective sums of $35,203 and $74,706, and the formulae used in arriving at such values and in computing the respective rentals therefrom are based upon a manifest error of law committed by the appraisers.

In the treatment of this issue by the lower Court, reference was made to the case of Ice Service Co., Inc. v. Henry Phipps' Estates (1927), 245 N.Y. 393, 157 N.E. 506, 508, 53 A.L.R. 692. The holding therein is to the effect that the report of the appraisers is final "unless they have mistaken their authority, departed from the submission, clearly misconceived their duties, acted upon some fundamental and apparent mistake or have been moved by fraud or bias." Appellant believes that a more articulate expression of the general rule applicable to the instant case, is contained in Burchell v. Marsh, et al (1854), 58 U.S. 344, 15 L. Ed. 96, and United States v. Farragut (1874), 89 U.S. 406, 22 L. Ed. 879, both of which cases are reviewed in the rather recent decision in Mancuso v. L. Gillarde Co. (1948 - D.C.

Mun. Ct. of App.), 61 A (2d) 677.

The rule, as stated in the Farragut case, at page 420, is as follows:

> "Where the award finds facts it is conclusive, where it finds or announces concrete propositions of law, unmixed with facts, its mistake, if one is made, could have been corrected in the Court below, and can be corrected here. Where a proposition is one of mixed law and fact in which the error of law, if there be one, cannot be distinctly shown, the parties must abide by the award.
>
> "The award was also liable, like any other award, to be set aside in the Court below, for such reasons as are sufficient in other courts. For exceeding the power conferred by the submission, for manifest mistake of law, for fraud, and for all the reasons on which awards are set aside in the Courts of law or chancery. ---"

Under the foregoing rule, appellant submits that the appraisers committed an error of law in determining the rentals for lots 1 and 2, which error is readily apparent from the appraisers' report. As discussed in point 1 of this argument, the appraisers were directed by the provisions of the leases to determine the then fair market value of the leased premises, including therewith, in each case, the other lot contained in the original parcel. In accordance with this requirement the appraisers arrived at an overall valuation of $109,909 for the 17,480 square feet. Then, the appraisers allotted a portion of this $109,909 to each of the lots, on a square foot evaluation basis, rather than by computing the rentals on a 20%-80% division of the total "appraised value of the land".

As previously contended by appellant, the leases contain no provision whatsoever, directing the appraisers to allocate a separate value to each of the lots and then take 20% of the value allocated to lot 1 and 80% of the value allocated to lot 2, in computing the rentals for the renewal term. Accordingly, appellant says that such departure from

the express directions of the leases constituted a mistake of law, which under the holding in the Farragut case, supra, should have been corrected in the Court below and can be corrected by this Court.

As to the collateral question that the interpretation given the leases by the appraisers constituted a mistake of law, reference is made to the case of Rheam v. Martin (1905), 26 App. D.C. 181. This Court said, regarding such point, at pages 190, 191, that -

> " --- The contract was in writing, and it was for the Court to declare its meaning and legal effect, when requested so to do, and not leave it to the determination of the jury. "

And on the same question, in Arsenault v. Angle (1945 - D.C. Mun. Ct. of App.), 43 A. (2d) 709, 711, in connection with the construction of a lease, the Court stated, as follows:

> "In effect appellant sought to have the legal question submitted to the jury. We think the trial judge properly refused to do so. The terms of the lease dealing with the 90 day notice were plainly set forth and involved no factual dispute which the jury might have considered. There is nothing before us which would suggest that this was other than a legal question to be construed and decided by the Court. "

The Court cited in support of such holding, the cases of Rheam v. Martin, supra; Turner v. Mertz (1925), 55 App. D.C. 177, 3 F. (2d) 348, 39 A.L.R. 1140, and McReynolds v. Mortgage & Acceptance Corporation (1926), 56 App. D.C. 342, 13 F. (2d) 313. Reference is made also, in this connection, to the case of Friedman v. Thomas J. Fisher & Co. (1952 - D.C. Mun. Ct. of App.), 88 A. (2d) 321.

Appellant therefor states, in concluding on this issue, that on the authority of the above-cited cases, the interpretation of the leases by the appraisers was a question of law. Appellant says also, that the appraisers committed an error of law in adopting an unauthorized formula by which they allocated a specific value to each lot and then computed the rentals on the basis of such values.

CONCLUSION

It is respectfully submitted that the judgment of the Court below should be reversed and that this Court should by its mandate direct the entry of judgment for appellant decreeing that the correct annual rentals under the leases for the renewal term are the sums of $1, 758. 54 for lot 1 and $7, 594. 17 for lot 2 as shown in the Appendix to appellant's brief, page 23 hereof.

Respectfully submitted

FREDERICK STOHLMAN
CLARENCE G. PECHACEK
GEORGE H. BEUCHERT, JR.
Washington 5, D. C.
Attorneys for Appellant

APPENDIX TO APPELLANT'S BRIEF

All rental computations are based upon the appraisers' valuation of $109,909.

I. APPELLANT'S CONTENTION:

Lot 1 - 20% of $109,909.00 = $21,981.80 at 8% = rental of $1,758.54 per annum or $146.55 per month.

Lot 2 - 80% of $109,909.00 = $87,927.20 plus $7,000.00 for building = $94,927.20 at 8% = rental of $7,594.17 per annum or $632.84 per month.

Total rental - Lots 1 and 2 = $9,352.71 per annum or $779.39 per month.

II. APPRAISERS' COMPUTATION:

Lot 1 - $35,302.00 allocated to said lot and 20% thereof = $7,040.60 at 8% = rental of $563.24 per annum or $46.93 per month.

Lot 2 - $74,706.00 allocated to said lot and 80% thereof = $59,764.80 plus $7,000.00 for building = $66,764.80 at 8% = rental of $5,341.18 per annum or $445.09 per month.

Total rental - Lots 1 and 2 = $5,904.42, and with minimum rental applicable for Lot 1, the total rental = $6,141.18 or $511.75 per month.

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James E. Schwab		
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JOINT APPENDIX

68 [Filed Nov. 28, 1955]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Chevy Chase Services, Inc., a corporation, trading as Chevy Chase Funeral Home, 5103 Wisconsin Avenue, N. W., Washington, D. C., Plaintiff	:	
v.	:	C. A. No. 5193-55
Mabel L. Marceron, 4816 Alton Place, N. W., Washington, D. C., Defendant.	:	

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

1. This action arises under Title 28, Sec. 2201 U.S. Code Ann., and is within the jurisdiction of this court as will hereinafter more fully appear.

2. The plaintiff, Chevy Chase Services, Inc., trading as Chevy Chase Funeral Home, is a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, doing business in the District of Columbia, and brings this suit in its own right as the lessee of the hereinafter described real estate. That the defendant, Mabel L. Marceron, is a resident of the District of Columbia, and is sued herein in her own right as lessor of the hereinafter described real estate.

3. That heretofore on, to-wit, the 15th day of October, 1945, defendant entered into two certain leases with Ernest A. Adams and James E. Betts; one of said leases was for Lot 1 in Square 1666 and the other said lease was for Lot 2 in Square 1666, both in the District of Columbia, whereby the defendant leased said lots and the improvements thereon to the said Ernest A. Adams and the said James E. Betts,

69 lessees, for a term of 10 years, beginning on the 1st day of December, 1945, and ending on the 30th day of November, 1955 for

the total rental of $8000 for said Lot 1 and $32,000 for said Lot 2; said rental being payable in monthly installments of $66.66 per month as to said Lot 1, and $266.66 per month as to said Lot 2. Copies of said leases are attached hereto marked "Exhibit A as to Lot 1 and Exhibit B as to lot 2 and prayed to be taken as a part hereof as though incorporated herein at length. That thereafter, on to-wit, the 3rd day of August, 1950 the said Ernest A. Adams and James B. Betts duly assigned said leases to the plaintiff with the written consent of the defendant. Copies of said Assignments marked "Exhibit C" as to Lot 1, and "Exhibit D" as to Lot 2 attached hereto and prayed to be taken as a part hereof as fully as though incorporated herein at length. That the lessees and the plaintiff duly entered upon the demised premises and fully complied with all the terms and conditions of said leases and of the covenants therein set out to be performed by them.

4. That each of said leases provided that the lessees had an option of extending the same for two additional terms of ten years each, the first one to begin on the 1st day of December, 1955, upon giving a written notice of their intention of renewing said leases at least six months prior to the expiration of the existing term.

5. That heretofore on, to-wit the 29th day of January, 1955 plaintiff duly served on the defendant a notice of its intention to exercise its option to renew said leases for an additional term of ten years beginning on the 1st day of December, 1955. A copy of said notice is attached hereto and prayed to be taken as a part hereof as fully as though incorporated herein at length, marked, "Exhibit E".

6. That thereafter, in compliance with the provisions of said leases, the plaintiff and the defendant each appointed an appraiser to appraise the value of said real estate and fix the rent for the same for
70 the next term of ten years beginning on the 1st day of December, 1955. That the said two appraisers so appointed as aforesaid, selected a third appraiser to form a committee of appraisers, as provided in said leases. That all of said appraisers were men of long experience in dealing with real estate and appraising the same in the District of

Columbia, and that the said committee of appraisers after many meetings and diligent study unanimously agreed on the value of said real estate and determined the rental value of the same for the next term to be $511.75 per month. That the said committee duly filed a written report with the plaintiff and defendant setting forth its findings, which was signed by each member of said committee. A copy of said report is attached hereto and prayed to be read as a part hereof as fully as though incorporated herein at length and marked "Exhibit F".

7. That the said leases provide, "A determination in writing by a majority (of the committee) shall be binding upon the lessee and the lessor as to the question of rental value of the leased premises as provided herein," but that notwithstanding the same the defendant through her attorney has refused to accept the same and has informed the plaintiff, that unless it pays a larger amount than that fixed by said committee of appraisers, she will immediately evict the plaintiff. That the plaintiff is ready, willing and able to pay to the defendant the rent as fixed by the said committee of appraisers, and does hereby in open court tender the same to the defendant.

8. That the said leases also provide, that during the term of any renewal thereof, the lessee shall pay the real estate taxes assessed against said real estate, "as and when taxes are due and payable without penalty to the District of Columbia." That the plaintiff stands ready, willing and able to pay said real estate taxes, in addition to the monthly installments of $511.75 fixed by said appraisers and to comply fully
71 with all other covenants contained in said leases which are to be performed by the lessee.

9. That on, to-wit, the 22nd day of November, 1955, plaintiff tendered to the defendant the sum of $ 511.75, representing the rent as determined by the committee of appraisers, as aforesaid, for the month of December, 1955, and $49.10 representing the real estate taxes assessed against the demised premises for the said month of December, 1955, and also the sum of $1,248.92, representing seven times the additional rent as provided by the provisions of said leases.

The defendant refused to accept the same, and under date of November 23, 1955 returned the same to the plaintiff. A copy of the letter from the agent of the defendant is attached hereto and made a part hereof as fully as though incorporated herein at length and marked "Exhibit G".

10. That the plaintiff and its predecessors in title, relying on the provisions of said leases have expended many thousands of dollars in improving said real estate and establishing its business over the period of the last ten years, and, after many hardships has established a paying business, and if forced to vacate will suffer the complete loss of its business. That plaintiff is without a plain, complete and adequate remedy at law, save through the intervention of this honorable court, and will suffer irreparable loss unless defendant is restrained from taking any action to evict plaintiff.

WHEREFORE, the premises considered, plaintiff prays that the court adjudge:

1. That the plaintiff has a good and valid lease of the aforesaid Lots 1 and 2, in Square 1666 in the District of Columbia for the term of ten years, beginning on the 1st day of December, 1955, upon paying rent in the monthly installments of $511.75 per month, plus the real estate taxes assessed against said real estate during said term.

72 2. That all the provisions contained in said leases dated October 15th, 1945 are applicable and binding on the plaintiff and defendant during said term;

3. That the defendant and her agents, servants and employees be enjoined, during the pendency of this action and permanently, from taking any action or filing any suit seeking to disposses plaintiff from said Lots 1 and 2, in Square 1666.

4. That the plaintiff recover its costs.

5. That the plaintiff have such other and further relief as to the court shall seem meet and the exigencies of the case may require.

CHEVY CHASE SERVICES, INC.,

By /s/ James E. Betts

President

/s/ Samuel J. L'Hommedieu
900 F Street, N. W.,
Washington, D.C.
Attorney for plaintiff

District of Columbia, to-wit:

James E. Betts, being first duly sworn on oath, deposes and says, that he is the President of the Chevy Chase Services, Inc., a corporation, the plaintiff herein, and makes this affidavit for and on behalf of said corporation and that he is duly authorized so to do, and that he has read the aforegoing and annexed Complaint and verily believes the facts stated therein to be true.

/s/ James E. Betts

[JURAT]

---

95 [Filed Dec. 19, 1955]

ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION

First Defense

1. The defendant admits the jurisdiction of this Court.

2. The defendant admits that she is a resident of the District of Columbia and that she is the owner and lessor of the real estate described in the complaint herein and states that the described property is subject to two leases each dated October 15, 1945, between the defendant and Ernest A. Adams and James E. Betts, lessees, which leases have been assigned to plaintiff herein, reserving, however, the right of the defendant to hold the said Ernest A. Adams and James E. Betts responsible for any liabilities or obligations under said leases. The defendant neither admits nor denies each and every remaining allegation contained in Paragraph 2 of the complaint since it is without sufficient knowledge or information to form a belief concerning the truth of such allegations.

3. The defendant, Mabel L. Marceron, admits the allegations contained in Paragraph 3 of the complaint.

96 4. The defendant, Mabel L. Marceron, admits the allegations contained in Paragraph 4 of the complaint.

5. The defendant admits the allegations contained in Paragraph 5 of the complaint.

6. The defendant admits the allegations contained in Paragraph 6 of the complaint.

7. The defendant, Mabel L. Marceron, admits the provisions of the leases quoted and admits the defendant, through her attorney, has refused to accept as rent the amount fixed by the appraisers, and for reason states that the appraisers have failed to use the formulae set forth in the leases to determine the rent. The defendant further admits that unless plaintiff pays the rental arrived at by the correct application of the formulae to compute same, or provides sufficient security against the non-payment of the same pending this Court's determination of the question pending herein, she will immediately file proceedings to evict the plaintiff.

8. The defendant admits the provisions in the leases requiring the lessee to pay the District of Columbia real estate taxes. The defendant is without information or belief as to the truth of the remaining allegations of the plaintiff with respect to its capacity and willingness to perform as described in Paragraph 8 of the complaint.

9. The defendant admits the allegations contained in Paragraph 9 of the complaint.

10. The defendant is without information or belief as to the truth of the allegations of the plaintiff with respect to the expenditure of its money in improving the said real estate or the establishment of its business, but denies that the plaintiff's inability to continue to occupy the property will result in the complete loss of its business and does further deny the need for injunctive relief as claimed in Paragraph
97 10 of the complaint.

Second Defense

The defendant, Mabel L. Marceron, avers the appraisers did not compute the rental value in accordance with the formulae in the leases,

which formulae as expressed in the subject leases are as follows:

The lease for Lot 1 provides in Paragraph 3, page 2:

> "The appraisers shall determine the then fair market value of the leased premises, including the ninety (90) foot wide lot abutting the North line of the ground demised under this lease, upon the assumption that the said abutting lot is subject to no restriction upon its use, for its most advantageous use or uses, and upon the further assumption that the land has no buildings or structures upon it. The rental for the ensuing ten (10) years period shall then be determined by the appraisers based upon a return to the lessor of eight per centum (8%) net per annum upon 20% of the appraised value of the land over and above real estate taxes."

The lease for Lot 2 provides in Paragraph 3, page 2:

> "The appraisers shall determine the then fair market value of the leased premises for its most advantageous use or uses, including the lot at the corner of Garrison Street and Wisconsin Avenue, Northwest, upon the assumption that said corner lot is in the same ownership as the leased premises and can be jointly used therewith for any lawful use or uses, and that said lot is subject to no restriction upon its use, and upon the further assumption that the land has no buildings or structures upon it, and shall add to such land value the sum of Seven Thousand Dollars ($7,000.00) as the assumed value of the building or buildings upon the land irrespective of the value of such structures or whether or not they then exist. The rental for the ensuing ten (10) year period shall then be determined by the appraisers based upon a return to the lessor of eight per centum (8%) net per annum upon 80% of

the appraised value of the land plus $7,000.00 over and above real estate taxes."

98 Despite the provisions quoted requiring the appraisal of Lots 1 and 2 as one parcel in fixing the rent payable during the option period, the appraisers appraised each lot separately. Accordingly, the fair market values of Lot 1 and Lot 2 were fixed at $35,203.00 and $74,706.00 respectively. The rental for each lot was then determined by the appraisers by taking 8 percent of 20 percent of the valuation of Lot 1 (i.e., .08 x .20 x $35,203.00) to achieve an annual rent of $563.24 and a monthly rent of $46.93. Since the lease covering Lot 1 prescribed a minimum rental of $66.66 per month for this lot, the said appraisers declared the latter sum to be the rent for Lot 1; the appraisers then took 80 percent of the valuation of Lot 2 (i.e., .80 x $74,706), or $59,764.80, added $7,000.00 for the improvements for a total of $66,764.80, then took 8 percent of the latter figure and arrived at the sum of $5,341.18 as the annual rental, or $445.09 as the monthly rental of said Lot 2, all of which is set forth in the appraisal of the appraisers dated October 10, 1955, (Exhibit F to the complaint). As the appraisers applied and interpreted the formulae, it leads to an absurdity, to wit, the rent resulting from said application for Lot 1, $563.24 per year, is less than 1.6 percent return on the appraisal of $35,203.00 and for Lot 2 slightly more than 6.5 percent. The appraisers attention was invited to their error by letter of the attorney for the defendant dated October 17, 1955, copy of which was sent to plaintiff, a copy of which is hereto annexed, marked Exhibit A and prayed to be read and taken as part hereof; that thereafter the appraisers addressed a letter dated October 19, 1955, to the attorney for the defendant, received by him on October 31, 1955, in reply to his letter of October 17, 1955, a copy of said letter of the appraisers being hereto annexed, marked Exhibit B, and prayed to be

99 read and taken as a part hereof. Thereafter, the attorney for the defendant received a letter, dated November 25, 1955, from Frank M. Doyle, the member of the committee of appraisers selected by the appraisers nominated by the parties herein, a copy of said letter being

hereto annexed, marked Exhibit C, and prayed to be read and taken as a part hereof; that the defendant avers that the formulae set forth in the leases to determine the rental values of the respective lots require the appraisers to appraise Lots 1 and 2 as one parcel, allocate 20 percent of said appraised value of said parcel to Lot 1 to determine its land value and 80 percent of said appraised valuation of said parcel to Lot 2, to determine its land value, then take 8 percent of the land valuation of Lot 1 to determine the annual rental and take 8 percent of the land valuation of Lot 2 plus $7,000.00 for improvements to determine the annual rental of Lot 2.

The proper application of the formulae based upon the total appraised value of Lots 1 and 2, namely, $109,909.00, which the defendant accepts as the appraisal of both lots taken as one parcel, is to allocate 20 percent of that value, $109,909.00, namely, $21,981.80 to the land value of Lot 1, and 80 percent of the said $109.909.00 to the land value of Lot 2, namely, $87,927.20; hence the rent for Lot 1 is 8 percent of $21,981.80 for an annual rental of $1,758.544 and a monthly rental of $146.55; and for Lot 2, 8 percent of the land value of $87,927.20 plus the value prescribed for the improvements of $7,000.00, a total of $94,927.20 to achieve an annual rental of $7,594.176 and a monthly rental of $632.84.

When negotiations between defendant and plaintiff were initiated in connection with the original lease in 1945, the present Lots 1 and 2 were
100 in one parcel designated as Parcwl 25/66; that in order to obtain permit for the operation of a funeral home, it was necessary to subdivide this parcel, which was done, into Lots 1 and 2, see Plat annexed, marked Exhibit D, and prayed to be read and taken as part hereof; that the rental of $4,000.00 per annum was agreed upon for the original Parcel 25/66; that two separate leases were entered into at a rental of $800.00 (20 percent of $4,000.00) per annum for Lot 1 and $3,200.00 (80 percent of $4,000.00), per annum for Lot 2. The provisions contained in the subject leases for the determination of the rent payable during the option period reflect the continuous and consistent intent of the parties to the leases that the property demised was to be treated as

a single parcel to be used for the single purpose of conducting an undertaking establishment, with a single valuation which would be allocated for the reasons just described on a 20 percent-80 percent basis to the respective lots to arrive at an individual lot valuation and finally based on an 8 percent return to the lessor, a rental to be paid by the lessee. The position taken by defendant lessor herein is entirely consistent with the intent of the parties and with the provisions of the leases reflecting said intent.

Third Defense

The plaintiff, Chevy Chase Services, Inc., has failed to join two indispensable parties, namely, Ernest A. Adams and James E. Betts, as required by Rule 19 of the Federal Rules of Civil Procedure. The leases dated October 15, 1945, covering Lots 1 and 2 in Square 1666, were executed by the said Ernest A. Adams and James E. Betts as lessees. Any extension of the said leases for an optional period extends also the responsibility of the said lessees for proper performance during
101 the said period, including payment of any rent adjudged by this Court to be required under the provisions for the determination of the rent during the optional period. The assignments of the leases dated August 3, 1950, copies of which are attached to the plaintiff's complaint as its Exhibits C and D, specifically reserve to the lessor all rights that the lessor has against the said Ernest A. Adams and James E. Betts under the said leases. The said Ernest A. Adams and James E. Betts have a joint interest in any determination by this Court of the respective rights and obligations of the lessor and lessee under the leases dated October 15, 1945, and are indispensable parties in any action having for its purpose a construction by this Court of the provisions contained in said lease. Both the said Ernest A. Adams and James E. Betts are subject to the jurisdiction of this Court as to both service of process and venue and can be made parties without depriving the Court of jurisdiction of the parties before it.

WHEREFORE, the defendant, Mabel L. Marceron, having fully answered the complaint herein, prays

1. That this Honorable Court enter a declaratory judgment fixing the rights and obligations of the lessor and the lessees under the leases dated October 15, 1945, covering Lots 1 and 2 in Square 1666 in the District of Columbia.

2. That the Court require the plaintiff to provide sufficient security to save harmless the defendant lessor from any loss of rent or real estate taxes pending the determination by this Court of the questions presented herein.

102 3. That this Honorable Court declare the rent payable by the plaintiff to the defendant for Lot 1 in Square 1666 be $146.55 per month and for Lot 2 in Square 1666 $632.84 per month; and that plaintiff reimburse defendant for real estate taxes assessed against the demised premises, and that the amount of the security deposited be increased to an amount equal to 7 months' rent as currently payable.

4. That Ernest L. Adams and James E. Betts be made parties, plaintiffs or defendants herein.

5. That the defendant be allowed her costs.

6. And for such other and further relief as the case may require and to the Court may seem fit and proper.

/s/ Mabel L. Marceron
Defendant

/s/ Frederick Stohlman
/s/ George H. Beuchert, Jr.
Attorneys for Defendant
821 Union Trust Building
Washington 5, D.C.

DISTRICT OF COLUMBIA, SS:

Mabel L. Marceron, being first duly sworn upon oath, deposes and says that she is the defendant in the above entitled cause; that she has read the foregoing answer by her subscribed and knows the contents thereof; that the matters stated therein of her own knowledge are true and those alleged upon information and belief she believes to be true.

/s/ Mabel L. Marceron
Defendant

[JURAT]

[CERTIFICATE OF SERVICE]

73 THIS AGREEMENT

Made this 15th day of October, A.D., one thousand nine hundred and forty-five (1945), by and between Mabel L. Marceron, of the District of Columbia, lessor, and Ernest A. Adams and James E. Betts, of the District of Columbia, lessees:

WITNESSETH, that the said lessor, for and in consideration of the sum of Eight Thousand (8,000.00) Dollars rent, and also the covenants, conditions, and agreements herein contained, and on the part of the lessees to be paid, kept, and performed, and for no other consideration except as herein expressed, does hereby let and rent to the said lessees and they have hereby taken as tenants of the lessor the following described land and premises, situate, lying and being in the District of Columbia, and known and designated as and being the Northeast corner of Wisconsin Avenue and Garrison Street, N.W. and described as:

Lot 1 in Square 1666 as per plat of sub-division recorded in Book 122, Page 36 of the records of the Surveyor's Office of the District of Columbia,

for the term of ten (10) years to commence with the first day of December, A.D., 1945, and to end on the thirtieth day of November, A. D., 1955, at the said rent of Eight Thousand (8,000.00) Dollars payable without demand at the place in the District of Columbia designated in writing from time to time by the lessor, in monthly installments of Sixty-six Dollars and Sixty-six cents ($66.66) in advance on the 1st day of each and every month during said term, beginning for the first of said payments on the 1st day of December, 1945, the receipt of One Dollar ($1.00) of said rent paid by lessees is hereby acknowledged by said lessor.

The lessees shall have the option to extend the period of this lease for a period of ten (10) additional years, and thereafter for a further period of ten (10) years (for a total of thirty (30) years from the date of first occupancy hereunder by the lessees) upon the following terms and conditions, which likewise shall apply to the first ten (10) year term of this lease unless inapplicable:

1. The stipulated monthly rental shall never be less than that provided for for the first ten (10) year term aforesaid commencing in the year 1945.

2. The lessees shall serve written notice of renewal upon lessor at the address at which last rent was paid not later than six (6) months prior to the expiration date in 1955, and not later than six (6) months prior to the expiration date in 1965, if the option to extend in 1955 is exercised by the lessees; otherwise the option rights shall forthwith expire and become void. With each such written notice of the exercise by lessees of the right to renew, the lessees shall name the appraiser selected by the lessees to determine the basis of rental for the period of the extension as hereinafter provided, and the amount of rental for the period of renewal shall be established prior to the commencement of such renewal period.

74 3. The rent for the periods following the expiration date hereof in 1955 (and the renewal period in 1965 if this lease is then in effect) shall be determined by a committee of appraisers consisting of one named by the lessees in the notice of renewal referred to above, one named in writing by lessor to lessees, and a third selected by such two. A determination in writing by a majority shall be binding upon lessees and lessor as to the question of the rental value of the leased premises as provided herein. Should the designee of the lessees or lessor fail or refuse to agree to a third appraiser, or should said third appraiser be agreed upon but not act under or accept the appointment, lessees or lessor may have a third appraiser designated by the Chief Justice of the Court of Appeals of the District of Columbia, or by the Chief Justice of the District Court of the United States for the District of Columbia, or the Chief Justice of the Intermediate Court of Appeals or the Chief Judge of the Municipal Court, or by the President of the Washington Real Estate Board, or its successor, or by the President of the bank or trust company in the District of Columbia having reported to the U.S. Treasury the largest amounts of deposits at the time. The committee of appraisers shall determine upon the amount of the rental of the

leased premises by not later than the expiration of the current term of the lease. The appraisers shall determine the then fair market value of the leased premises, including the ninety (90) foot wide lot abutting the North line of the ground demised under this lease, upon the assumption that the said abutting lot is subject to no restriction upon its use, for its most advantageous use or uses, and upon the further assumption that the land has no buildings or structures upon it. The rental for the ensuing ten (10) year period shall then be determined by the appraisers based upon a return to the lessor of eight per centum (8%) net per annum upon 20% of the appraised value of the land over and above real estate taxes. The appraisal fee to be paid shall be the same as rate charged by the Washington Real Estate Board at the time of appraisal. In the event the Washington Real Estate Board is no longer in existance or does not at that time have a set rate of appraisal fees, the fee shall be in accordance with custom, and the fee shall be equally divided between the three appraisers. The cost shall be shared equally between the Lessor and the Lessees.

4. Lessees covenant and agree to pay said lessor the said rent as aforesaid for the full term hereof; that they will not assign this lease or any portion of the term, or sublet the premises or any part thereof, without the written consent of the lessor first had and obtained; that the said lessees will not use or suffer to be used said premises for any disorderly or unlawful purpose, or for any other purpose than in accordance with the zoning regulations, immediately remove snow and ice from the sidewalks and walkways and steps thereof, and the lessor or her assigns shall not be liable therefor or for any work or materials furnished said premises, and the said lessees have no authority to incur any debt or make any charge against the lessor or her assigns or create any lien upon said leased property for any work or materials furnished the same.

5. Lessees shall have the right to improve the premises for business or residential use provided plans for such improvement are first submitted to the lessor for her approval. Such approval shall

not be unreasonably withheld. Lessees shall have the right to remove such improvements at the termination of this lease or any extension thereof, provided the premises are left in a reasonably similar condition to the condition of the premises existing at the time of the sigining of this lease. The Lessor shall retain the right to require the Lessees to remove any or all of the improvements made to the premises by the Lessees by giving Lessees written notice ninety (90) days prior to the expiration date of the
75 lease, and the Lessees shall remove such designated improvements before the termination of the lease.

6. Lessor shall pay real estate taxes, provided, however, should there be an assessment for improvements levied against the premises by reason of improvements made to the premises by the Lessees, then and in that event the additional real estate taxes levied as a result of said increase in assessment for improvements shall be paid as rent by the lessees, payable as and when taxes are due and payable without penalty to the District of Columbia. During the period of any extension of this lease, the lessees shall pay the entire amount of real estate taxes for land and improvements. Special assessments for work completed, after date hereof shall be payable as rent by the lessees as the same become due and payable without penalty to the District of Columbia. Either the lessor or lessees may at any time pay overdue real estate taxes or special assessments levied against the leased premises. As to the part payable hereunder by the lessor and paid by the lessees, the amount so paid by the lessees for the lessor may be deducted from the rent next due and payable from lessees to lessor; and as to the part payable hereunder by the lessees and paid by the lessor, the amount so paid by the lessor for the lessees shall be due and payable immediately as rent from the lessees.

7. Provided always, that if the rent aforesaid, or any installment thereof, shall not be paid on the day when the same becomes due and payable as aforesaid, although no demand shall have been made for the same; or if the lessees or thier assigns shall fail or neglect to keep and perform each and every of the covenants, conditions, and agreements herein contained and on the part of the said lessees to be kept and per-

formed, or if the same or any of them shall be broken, then and in each and every such case from thenceforth and at all times thereafter, at the option of the lessor or her assigns, the lessees' right of possession shall thereupon end and determine, and the lessor or her assigns shall be entitled to the possession of said leased premises, and to re-enter the same without demand of rent or demand of possession of the said premises, and may forthwith proceed to recover possession of the said leased premises by process of law, any notice to quit or of intention to exercise said option, or to re-enter the same being hereby expressly waived by the lessees and their assigns.

8. In the event of such re-entry by process of law, or otherwise, the lessees nevertheless covenant and agree to remain answerable for any and all damages, deficiency or loss of rent which the lessor may sustain by such re-entry and the lessor reserves full power, which is hereby acceeded to by the lessees, to re-let the said premises for the benefit of the lessees.

9. Lessees agree that this lease shall be made subordinate to any mortgage or deed of trust to secure the payment of an amount not to exceed fifty percent (50%) of the fair market value of the property at the time of the recording of such lien, and lessees covenant that they will execute such instruments as may be required to accomplish such subordination provided that the said mortgage or deed of trust shall require amortization of the indebtedness by monthly, semi-annual or annual payments in amounts not exceeding the rent payable for such monthly, semi-annual or annual periods, less real estate taxes, and further, that any instrument providing for the subordination of this lease shall also require the holder of the mortgage or deed of trust to notify the Lessees of any default and give the Lessees an opportunity to make good any default as hereinafter provided for. Beyond such 50% lessor may encumber said leased premises in any amount, subject, however, as to such excess over 50% to the terms of this lease agreement. It is provided that lessees shall have the right to pay any interest or amortization payment becoming due on any indebetness secured ahead

of this lease agreement in order to prevent a default under the deed of trust or mortgage securing such indebtedness, and receive credit on the rent overdue or next becoming due for the amount so advanced by the Lessees.

10. Cost of examination of title and recording this lease shall be paid by lessees.

11. Lessees have deposited with lessor at the time of the execution and delivery hereof a sum equal to seven (7) months' rent, as security from the lessees to the lessor for the faithful performance by the lessees of the covenants hereof, and each of said covenants. The lessor shall have the right to deduct from said security deposit at any time an amount equal to the sum necessary to save it harmless against any breach of the covenants of this lease by lessees, but such deduction shall be made at the option of the lessor and lessees cannot claim the right to have said security deposit or any part thereof applied to cure any such breach on the part of the lessees except that the balance of said security deposit remaining in the hands of the lessor at the time of the termination of this lease and any extension thereof, after deductions by the lessor for all other proper purposes, shall be applied in payment of the rent last becoming due hereunder or under any renewal or extension hereof. The unused portion of the security deposit shall be kept invested in obligations of the United States Government, and interest thereon shall be paid by lessor to lessees or to account of lessees as the same is received by lessor. Lessees covenant to keep the amount of said security deposit at all times in the amount provided for above, an amount equal to seven (7) months' rent as currently payable.

12. It is further covenanted and agreed that should the lessees fail in business, make an assignment or other conveyance for the benefit of their creditors, file a voluntary petition in bankruptcy, be adjudicated a bankrupt, or suffer or permit a final judgment or decree to be entered against them for the payment of money and not discharge

said judgment or decree within ten (10) days after its rendition, or if an execution shall be levied against its interest in the term hereby created and demised, or if any suit shall be prosecuted against them, which shall involve the possession of said demised premises by an officer of the Court or of the law, or by any person other than the lessor, then and in every such event, the unexpired portion of the term hereby created shall, ipso facto, at the lessor's option, cease and determine, and the lessor may proceed to recover possession as provided in the preceeding paragraph in cases of breach of covenant, it being expressly understood and agreed that this lease may not be assigned by operation of law.

13. The lessees expressly covenant and agree to pay said rent as aforesaid, and also keep and perform each and every of the covenants, conditions, and agreements herein contained.

14. All personal property in said premises shall be and remain at lessees' sole risk, and lessor shall not be liable for any damage to, or loss of such personal property arising from any acts of negligence of any other persons, nor shall the lessor be liable for any injury to the persons of the lessees or other persons in or about the premises, the lessees expressly agreeing to save the lessor harmless in all such cases. Lessees, at their own expense, shall carry and maintain in a company satisfactory to lessor Public Liability Insurance with limits of $20,000.00 for injury to one person, and $50,000.00 for injury to more than one person, indemnifying the lessor, his agent, and the lessees from and against claims for personal injuries suffered or sustained by third persons while lawfully upon said premises and shall furnish lessor with a certificate or endorsement showing that such insurance is in full force and effect.

15. Lessees will comply with all rules and regulations now in effect or that may hereafter be enacted by the District or Federal
77 government in so far as the same pertain to the conduct of any business in the demised premises.

16. In the event eminent domain proceedings shall be instituted against the leased premises or a part thereof, lessees will make no claim for compensation in the proceedings, nor shall lessees be entitled to such compensation and lessees agree that this lease shall terminate when title to the leased premises is taken by the condemning authority, provided the rental is abated from such date; provided, however, should a part only of the property condemned be taken and the part taken not materially interfere with the proper conduct of a business establishment, then and in such event the extent to which the rent shall be abated from the date of the actual and physical taking of the property shall be determined by arbiters selected by the lessor and lessees as in paragraph numbered three hereof provided.

17. It is understood and agreed that a waiver of one or more breaches of a covenant herein contained shall not be considered a waiver of the covenant or agreement itself or of any subsequent or other breach of the same covenant or agreement.

18. And in the event the said lessees shall elect and be suffered to remain in possession of the said premises at the expiration of the term hereby created, said lessees shall, by virtue of this agreement, become a tenant by the month at the rental per month of the monthly installments of rent above provided to be paid for the last month of this lease as aforesaid, which said monthly tenant shall be subject to all the conditions and covenants of said lease as though the same had been a monthly tenancy and shall give to the said lessor at least thirty days' written notice of any intention to remove from said premises, and shall be entitled to a like notice from lessor in the event lessor desires possession of said premises, provided, however, that said tenant by the month shall not be entitled to any notice in event the said rent is not paid in advance without demand, the usual thirty days' written notice being hereby expressly waived.

19. The lessees at their own cost and expense shall fully insure against loss from fire, wind and storm any improvements at any time existing or erected on the leased premises, the proceeds to be payable jointly to the lessor and lessees and to be used by them in restoring the loss.

20. It is further understood and agreed that should the Lessor receive an acceptable bona fide offer to sell the premises leased herein and the adjoining Lot 2, Square 1666 the Lessees shall have the right to purchase the said property at the same price and upon the same terms and conditions as constitutes the said acceptable bona fide offer, provided that the Lessees make a deposit in the amount called for by said bona fide offer and sign a contract of purchase with the Lessor within thirty (30) days after receiving written notice of the receipt by the Lessor of such acceptable bona fide offer, settlement to be had at the time provided for in said bona fide offer. Failure upon the part of the Lessees to avail themselves of this privilege shall constitute a waiver of the right contained in this paragraph provided the Lessor actually accepts the said acceptable bona fide offer and conveys the property to the person or persons making the said offer or his or their nominee.

21. The lessor in appointing James E. Schwab her Rental Agent herein, does so for and in consideration of his services in securing the lessees herein and the negotiation of this lease, and agrees to pay said Agent a commission in accordance with the schedule of the Washington Real Estate Board on all rentals paid during the full term of this lease and/or any renewals thereof, and the lessor does hereby appoint said James E. Schwab her
78 agent to collect said rent during the full term of the lease and/or any renewals thereof, and to deduct therefrom the present regular commission fixed by the Washington Real Estate Board. In the event of the purchase of the leased property by lessees during the term of this lease or any renewal thereof, the right to continue to collect rents or receive any commission shall cease and be at an end but said James E. Schwab, his heirs or assigns, shall be paid by the lessor, her heirs or assigns, a commission of five percent (5%) of the sale price upon the settlement of the sale and the recording of the deed in connection with such settlement of sale.

22. It is further understood and agreed that as a specific term, covenant and condition of this lease that in the event the property owned by the Lessor and being Lot 2 in Square 1666, and under lease dated October 15, 1945 be repossessed by the Lessor as a result of a default in the rental, violation of any of the provisions of the said lease, or failure to renew the lease as provided in the said lease, the Lessor at

any time thereafter shall have the right to cancel this lease by giving sixty (60) days' notice in writing of her intention so to do.

It is mutually agreed that this lease and the covenants, conditions and agreements contained therein shall bind the heirs, executors, administrators and assigns of the respective parties hereto; and that the lessor shall have the right to assign this lease in whole or in part.

IN TESTIMONY WHEREOF, the said parties have hereunto signed their names and affixed their seals the day and year first hereinbefore written.

/s/ Mabel L. Marceron (SEAL)
Lessor

/s/ James E. Betts (SEAL)

/s/ Ernest A. Adams (SEAL)
Lessees

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79 DISTRICT OF COLUMBIA, SS:

I, L. Vaughan Bowly, a Notary Public in and for the District of Columbia, do hereby certify that Mabel L. Marceron, lessor under the terms of a certain deed of lease bearing date on the 15th day of October, 1945, and hereto annexed, personally appeared before me in said District, being personally well known to me as the person who executed the said deed of lease, and acknowledged the same to be her act and deed.

Given under my hand and seal this 14th day of November, 1945.

/s/ L. Vaughan Bowly
Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

I, _____, a Notary Public in and for the District of Columbia, do hereby certify that Ernest A. Adams and James E. Betts, lessees under the terms of a certain deed of lease bearing date on the 15th day of October, 1945, and hereto annexed, personally appeared before me in said District, being personally well known to me as the persons who executed the said deed of lease, and acknowledged the same to be their act and deed.

Given under my hand and seal this 15th day of November, 1945.

/s/ Illegible
Notary Public, D.C.

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80 THIS AGREEMENT

Made this 15th day of October, A.D., one thousand nine hundred and forty-five (1945), by and between Mabel L. Marceron, of the District of Columbia, lessor, and Ernest A. Adams and James E. Betts, of the District of Columbia, lessees:

WITNESSETH, that the said lessor, for and in consideration of the sum of Thirty-two Thousand (32,000,00) Dollars rent, and also the covenants, conditions, and agreements herein contained, and on the part of the lessees to be paid, kept, and performed, and for no other consideration except as herein expressed, does hereby let and rent to the said lessees and they have hereby taken as tenants of the lessor the following described land and premises, situate, lying and being in the District of Columbia, and known and designated as and being premises known as and numbered 5103 Wisconsin Avenue, N. W., Washington, D. C. together with the following described land, viz:

Lot 2, Square 1666, as per plat of sub-division recorded in Book 122, Page 36 of the records of the Surveyor's Office of the District of Columbia,

for the term of ten (10) years to commence with the first day of December, A. D., 1945, and to end on the thirtieth day of November, A.D., 1955, at the said rent of Thirty-two Thousand (32,000.00) Dollars payable without demand at the place in the District of Columbia designated in writing from time to time by the lessor, in monthly installments of Two Hundred Sixty-six Dollars and Sixty-six cents ($266.66) in advance on the 1st day of each and every month during said term, beginning for the first of said payments on the 1st Day of December, 1945, the receipt of One Dollar ($1.00) of said rent paid by lessees is hereby acknowledged by said lessor.

The performance on the part of the Lessees under this lease is contingent upon the Lessees obtaining a permit for the use of the premises as an undertaking establishment with 30 days after the signing of the lease.

The lessees shall have the option to extend the period of this lease for a period of ten (10) additional years, and thereafter for a further period of ten (10) years (for a total of thirty (30) years from the date of first occupany hereunder by the lessees) upon the following terms and conditions, which likewise shall apply to the first ten (10) year term of this lease unless inapplicable:

1. The stipulated monthly rental shall never be less than that provided for for the first ten (10) year term aforesaid commencing in the year 1945.

2. The lessees shall serve written notice of renewal upon lessor at the address at which last rent was paid not later than six (6) months prior to the expiration date in 1955, and not later than six (6) months prior to the expiration date in 1965, if the option to extend in 1955 is exercised by the lessees; otherwise the option rights shall forthwith expire and become void. With each such written notice of the exercise by lessees of the right to renew, the lessees shall name the appraiser selected by the lessees to determine the basis of rental for the period of the extension as hereinafter provided, and the amount of rental for the period of renewal shall be established prior to the commencemant of such renewal period.

81 3. The rent for the periods following the expiration date hereof in 1955 (and for renewal period in 1965 if this lease is then in effect) shall be determined by a committee of appraisers consisting of one named by the lessees in the notice of renewal referred to above, one named in writing by the lessor to lessees, and a third selected by such two. A determination in writing by a majority shall be binding upon lessee and lessor as to the question of the rental value of the leased premises as provided herein. Should the designee of the lessees or lessor fail or refuse to agree to a third appraiser, or should said third appraiser be agreed upon but not act under or accept the appointment, lessees or lessor

may have a third appraiser designated by the Chief Justice of the Court of Appeals of the District of Columbia, or by the Chief Justice of the District Court of the United States for the District of Columbia, or the Chief Justice of the Intermediate Court of Appeals or the Chief Judge of the Municipal Court, or by the President of the Washington Real Estate Board, or its successor, or by the president of the bank or trust company in the District of Columbia having reported to the U.S. Tre asury the largest amounts of deposits at the time. The committee of appraisers shall determine upon the amount of the rental of the leased premises by not later than the expiration of the current term of the lease. The appraisers shall determine the then fair market value of the leased premises for its most advantageous use or uses, including the lot at the corner of Garrison Street and Wisconsin Avenue, Northwest, upon the assumption that said corner lot is in the same ownership as the leased premises and can be jointly used therewith for any lawful use or uses, and that said lot is subject to no restriction upon its use, and upon the further assumption that the land has no buildings or structures upon it, and shall add to such land value the sum of Seven Thousand Dollars ($7,000.00) as the assumed value of the building or buildings upon the land irrespective of the value of such structures or whether or not they then exist. The rental for the ensuing ten (10) year period shall then be determined by the appraisers based upon a return to the lessor of eight per centum (8%) net per annum upon 80% of the appraised value of the land plus $7,000.00 over and above real estate taxes. The appraisal fee to be paid shall be the same as rate charged by the Washington Real Estate Board at the time of appraisal. In the event the Washington Real Estate Board is no longer in existence or does not at that time have a set rate of appraisal fees, the fee shall be in accordance with custom, and the fee shall be equally divided between the three appraisers. The cost shall be shared equally between the Lessor and the Lessees.

4. Lessees further covenant and agree that all trade fixtures hereafter placed in the leased premises shall be removed by the lessees at the expiration of the term hereby created, or any renewal or extension

thereof, and the walls, ceilings and floors and other parts of the leased premises shall be left in good and safe condition, ordinary wear and tear excepted.

5. Lessees covenant and agree to pay said lessor the said rent as aforesaid for the full term hereof; that they will not assign this lease or any portion of the term, or sublet the premises or any part thereof, without the written consent of the lessor first had and obtained; that the said lessees will not use or suffer to be used said premises for any disorderly or unlawful purpose, or for any other purpose than an undertaking establishment and funeral home; that they will not suffer or commit any waste to, in, or upon the said building, fixtures, and premises; that they will at their own expense during said term keep said leased premises, including the building, fixtures, plumbing and appurtenances thereof in substantial condition and in good repair, clean, and in good working order and
82 proper sanitary condition, all of which premises are now in such condition and repair, immediately remove snow and ice from the sidewalks and walkways and steps thereof, and the lessor or her assigns shall not be liable therefor or for any work or materials furnished said premises, and the said lessees have no authority to incur any debt or make any charge against the lessor or her assigns or create any lien upon said leased property for any work or materials furnished the same.

6. Lessees agree that they will at the end of their tenancy surrender the said leased premises in such substantial condition and good repair, good working order, etc., as aforesaid, and clean, ordinary wear and tear and loss by fire and storm excepted; that they will also pay all charges for gas, electricity and water used on said premises when the bills therefor become due and payable.

7. Lessees shall have the privilege of remodeling and expanding the leased premises to meet the needs of the business to be conducted therein, such remodeling however shall be subject to approval in writing from the lessor, which approval in writing shall not unreasonably be withheld. Such remodeling shall be at the cost of the lessees who shall not be required to restore the premises at the expiration of the tenancy in their

original condition, but shall deliver the premises, including any additions thereto or any part thereof, in good condition, ordinary wear and tear excepted.

8. Lessees shall pay for all costs of maintaining the leased premises for the period of the lease and any renewal thereof.

9. Lessor shall pay real estate taxes, provided, however, should the amount of the assessment for improvements be increased by reason of improvements or changes made to the premises by the lessees, then and in that event the additional real estate taxes levied as a result of said increase in assessment for improvements shall be paid as rent by the lessees, payable as and when taxes are due and payable without penalty to the District of Columbia. During the period of any extension of this lease, the lessees shall pay the entire amount of real estate taxes. Special assessments for work completed, after date hereof shall be payable as rent by the lessees as the same become due and payable without penalty to the District of Columbia. Either the lessor or lessees may at any time pay overdue real estate taxes or special assessments levied against the leased premises. As to the part payable hereunder by the lessor and paid by the lessees, the amount so paid by the lessees for the lessor may be deducted from the rent next due and payable from lessees to lessor; and as to the part payable hereunder by the lessees and paid by the lessor, the amount so paid by the lessor for the lessees shall be due and payable immediately as rent from the lessees.

10. Provided always, that if the rent aforesaid, or any installment thereof, shall not be paid on the day when the same becomes due and payable as aforesaid, although no demand shall have been made for the same; or if the lessees or their assigns shall fail or neglect to keep and perform each and every of the covenants, conditions, and agreements herein contained and on the part of the said lessees to be kept and performed, or if the same or any of them shall be broken, than and in each and every such case from thenceforth and at all times thereafter, at the option of the lessor or her assigns, the lessees' right of possession shall thereupon end and determine, and the lessor or her assigns shall be entitled to the

possession of said leased premises, and to re-enter the same without demand of rent or demand of possession of the said premises, and may forth-
83 with proceed to recover possession of the said leased premises by process of law, any notice to quit or of intention to exercise said option, or to re-enter the same being hereby expressly waived by the lessees and their assigns.

11. In the event of such re-entry by process of law, or otherwise, the lessees nevertheless covenant and agree to remain answerable for any and all damages, deficiency or loss of rent which the lessor may sustain by such re-entry and the lessor reserves full power, which is hereby acceeded to by the lessees, to re-let the said premises for the benefit of the lessees.

12. Lessees agree that this lease shall be made subordinate to any mortgage or deed of trust to secure the payment of an amount not to exceed fifty percent (50%) of the fair market value of the property at the time of the recording of such lien, and lessees covenant that they will execute such instruments as may be required to accomplish such subordination provided that the said mortgage or deed of trust shall require amortization of the indebtedness by monthly, semi-annual or annual payments in amounts not exceeding the rent payable for such monthly, semi-annual or annual periods, less real estate taxes, and further, that any instrument providing for the subordination of this lease shall also require the holder of the mortgage or deed of trust to notify the Lessees of any default and give the Lessees an opportunity to make good any default as hereinafter provided for. Beyond such 50% lessor may encumber said leased premises in any amount, subject, however, as to such excess over 50% to the terms of this lease agreement. It is provided that lessees shall have the right to pay any interest or amortization payment becoming due on any indebtedness secured ahead of this lease agreement in order to prevent a default under the deed of trust or mortgage securing such indebtedness, and receive credit on the rent overdue or next becoming due for the amount so advanced by the lessees.

13. Cost of examination of title and recording this lease shall be paid by lessees.

14. Lessees have deposited with lessor at the time of the execution and delivery hereof a sum equal to seven (7) months' rent, as security from the lessees to the lessor for the faithful performance by the lessees of the covenants hereof, and each of said covenants. The lessor shall have the right to deduct from said security deposit at any time an amount equal to the sum necessary to save it harmless against any breach of the covenants of this lease by lessees, but such deduction shall be made at the option of the lessor and lessees cannot claim the right to have said security deposit or any part thereof applied to cure any such breach on the part of the lessees except that the balance of said security deposit remaining in the hands of the lessor at the time of the termination of this lease and any extension thereof, after deductions by the lessor for all other proper purposes, shall be applied in payment of the rent last becoming due hereunder or under any renewal or extension hereof. The unused portion of the security deposit shall be kept invested in obligations of the United States Government, and interest thereon shall be paid by lessor to lessees or to account of lessees as the same is received by lessor. Lessees covenant to keep the amount of said security deposit at all times in the amount provided for above, an amount equal to seven (7) months' rent as currently payable.

15. It is further covenanted and agreed that should the lessees fail in business, make an assignment or other conveyance for the benefit of their creditors, file a voluntary petition in bankruptcy, be adjudicated a bankrupt, or suffer or permit a final judgment or decree to be entered against them for the payment of money and not discharge said judgment or decree within ten (10) days after its rendition, or if an execution shall be levied against its interest in the term hereby created and
84 demised, or if any suit shall be prosecuted against them, which shall involve the possession of said demised premises by an officer of the Court or of the law, or by any person other than the lessor, then and in every such event, the unexpired portion of the term hereby created shall, ipso facto, at the lessor's option, cease and determine, and the

lessor may proceed to recover possession as provided in the preceding paragraph in cases of breach of covenant, it being expressly understood and agreed that this lease may not be assigned by operation of law.

16. The lessees expressly covenant and agree to pay said rent as aforesaid, and also keep and perform each and every of the covenants, conditions, and agreements herein contained.

17. All personal property in said premises shall be and remain at lessees' sole risk, and lessor shall not be liable for any damage to, or loss of such personal property arising from any acts of negligence of any other persons, nor from the leaking of the roof, or from the bursting, leaking or overflowing of water, sewer or steam pipes, or from heating or plumbing fixtures, or from the handling of electric wires or fixtures, or from any other cause whatsoever, nor shall the lessor be liable for any injury to the persons of the lessees or other persons in or about the premises, the lessees expressly agreeing to save the lessor harmless in all such cases. Lessees, at their own expense, shall carry and maintain in a company satisfactory to lessor Public Liability Insurance with limits of $20, 000. 00 for injury to one person, and $50, 000. 00 for injury to more than one person, indemnifying the lessor, his agent, and the lessees from and against claims for personal injuries suffered or sustained by third persons while lawfully upon said premises and shall furnish lessor with a certificate or endorsement showing that such insurance is in full force and effect.

18. Lessees will comply with all rules and regulations now in effect or that may hereafter be enacted by the District or Federal government in so far as the same pertain to the conduct of any business in the demised premises.

19. In the event eminent domain proceedings shall be instituted against the leased premises or a part thereof, lessees will make no claim for compensation in the proceedings, nor shall lessees be entitled to such compensation and lessees agree that this lease shall terminate when title to the leased premises is taken by the condemning authority, provided the rental is abated from such date; provided, however, should

a part only of the property condemned be taken and the part taken not materially interfere with the proper conduct of an undertaking establishment, then and in such event the extent to which the rent shall be abated from the date of the actual and physical taking of the property shall be determined by arbiters selected by the lessor and lessees as in paragraph numbered three hereof provided.

20. It is understood and agreed that a waiver of one or more breaches of a covenant herein contained shall not be considered a waiver of the covenant or agreement itself or of any subsequent or other breach of the same covenant or agreement.

21. And in the event the said lessees shall elect and be suffered to remain in possession of the said premises at the expiration of the term hereby created, said lessees shall, by virtue of this agreement, become a tenant by the month at the rental per month of the monthly installments of rent above provided to be paid for the last month of this lease as aforesaid, which said monthly tenant shall be subject to all the conditions and covenants of said lease as though the same had been a monthly tenancy and shall give to the said lessor at least thirty days' written
85 notice of any intention to remove from said premises, and shall be entitled to a like notice from lessor in the event lessor desires possession of said premises, provided, however, that said tenant by the month shall not be entitled to any notice in event the said rent is not paid in advance without demand, the usual thirty days' written notice being hereby expressly waived.

22. The lessees at their own cost and expense shall fully insure against loss from fire, wind and storm any improvements at any time existing or erected on the leased premises, the proceeds to be payable jointly to the lessor and lessees and to be used by them in restoring the loss.

23. It is further understood and agreed that should the lessor receive an acceptable bona fide offer to sell the premises leased herein and the adjoining Lot 1, Square 1666, the Lessees shall have the right to purchase the said property at the same price and upon the same terms and conditions as constitutes the said acceptable bona fide offer,

provided that the Lessees make a deposit in the amount called for by said bona fide offer and sign a contract of purchase with the Lessor within thirty (30) days after receiving written notice of the receipt by the Lessor of such acceptable bona fide offer, settlement to be had at the time provided for in said bona fide offer. Failure upon the part of the Lessees to avail themselves of this privilege shall constitute a waiver of the right contained in this paragraph provided the Lessor actually accepts the said acceptable bona fide offer and conveys the property to the person or persons making the said offer or his or their nominee.

24. The lessor in appointing James E. Schwab her Rental Agent herein, does so for and in consideration of his services in securing the lessees herein and the negotiation of this lease, and agrees to pay said Agent a commission in accordance with the schedule of the Washington Real Estate Board on all rentals paid during the full term of this lease and/or any renewals thereof, and the lessor does hereby appoint said James E. Schwab, her agent to collect said rent during the full term of this lease and/or any renewals thereof, and to deduct therefrom the present regular commission fixed by the Washington Real Estate Board. In the event of the purchase of the leased property by lessees during the term of this lease or any renewal thereof, the right to continue to collect rents or receive any commission shall cease and be at an end but said James E. Schwab, his heirs or assigns, shall be paid by the lessor, her heirs or assigns, a commission of five per cent (5%) of the sales price upon the settlement of the sale and the recording of the deed in connection with such settlement of sale.

25. It is further understood and agreed that as a specific term, covenant and condition of this lease that in the event the property owned by the Lessor being Lot 1, Square 1666, and under lease dated October 15, 1945, be repossessed by the Lessor as a result of a default in the rental, violation of any of the provisions of the said lease, or failure to renew the lease as provided in the said lease, the Lessor at any time thereafter shall have the right to cancel this lease by giving Sixty (60) days notice in writing of her intention so to do.

It is mutually agreed that this lease and the covenants, conditions and agreements contained therein shall bind the heirs, executors, ad-
86 ministrators and assigns of the respective parties hereto; and that the lessor shall have the right to assign this lease in whole or in part.

IN TESTIMONY WHEREOF, the said parties have hereunto signed their names and affixed their seals the day and year first hereinbefore written.

/s/ Mabel L. Marceron (SEAL)
/s/ Ernest A. Adams (SEAL)
/s/ James E. Betts (SEAL)

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87 DISTRICT OF COLUMBIA, ss:

I, L. Vaughan Bowly, a Notary Public in and for the District of Columbia, do hereby certify that Mabel L. Marceron, lessor under the terms of a certain deed of lease bearing date on the 15th day of October, 1945, and hereto annexed, personally appeared before me in said District, being personally well known to me as the person who executed the said deed of lease, and acknowledged the same to be her act and deed.

Given under my hand and seal this 14th day of November, 1945.

/s/ L. Vaughan Bowly
Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

I, _____, a Notary Public in and for the District of Columbia, do hereby certify that Ernest A. Adams and James E. Betts, lessees under the terms of a certain deed of lease bearing date on the 15th day of October, 1945, and hereto annexed, personally appeared before me in said District, being personally well known to me as the persons who executed the said deed of lease, and acknowledged the same to be their act and deed.

Given under my hand and seal this 15th day of November, 1945.

/s/
Notary Public, D. C.

88 Assignment of Lease:

We, Ernest A. Adams and James E. Betts, of the District of Columbia, the lessees named in the foregoing lease from Mabel L. Marceron, dated October 15, 1945, in re Lot 1 in Square 1666, in consideration of $1.00 and other valuable considerations and of the covenants hereinafter contained, do hereby assign, transfer and set over to Chevy Chase Services, Inc., the said lease, the premises hereby demised and all right, title and interest in and under the same, and Chevy Chase Services, Inc., the said assignee, in consideration of the foregoing assignment, hereby covenants with the said assignor that it will pay the rent which may hereafter become due according to the terms of said lease and perform all the covenants and stipulations in said lease which are to be performed by the lessee.

IN WITNESS WHEREOF we have hereunto set our hands and seal this 3rd day of August, 1950.

Assignor /s/ Ernest A. Adams (SEAL)
/s/ James E. Betts (SEAL)

Assignee /s/ James E. Betts (SEAL)
Chevy Chase Services, Inc.

Acceptance of Assignment:

I, Mabel L. Marceron, the lessor named in the foregoing lease, hereby assent to the above-written assignment thereof, and accept the above assignee, Chevy Chase Services, Inc., as lessee under the terms of said lease; said assignment, however, in no wise shall release or discharge the said Ernest A. Adams and James E. Betts from any liabilities or obligations under said lease.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 9th day of August, 1950.

/s/ Mabel L. Marceron

89 DISTRICT OF COLUMBIA, ss:

I, Louise A. Justice, a Notary Public in and for the District of Columbia, do hereby certify that Ernest A. Adams and James E. Betts, lessees under the terms of the hereto annexed deed of lease bearing date on the 15th day of October, 1945, and assignors under the foregoing assignment of lease, personally appeared before me in said District, being personally known to me as the person who executed the said assignment of lease and acknowledged the same to be their act and deed.

Given under my hand and seal this 3rd day of August, 1950.

/s/ Louise A. Justice
Notary Public
Commission expires: Oct. 31, 1951

DISTRICT OF COLUMBIA, ss:

I, Louise A. Justice, a Notary Public in and for the District of Columbia, do hereby certify that Jas. E. Betts, President of Chevy Chase Services, Inc., assignee to the foregoing Assignment of Lease, personally appeared before me in said District, being personally well known to me as the President of Chevy Chase Services, Inc., and as the person who executed the foregoing Assignment of Lease and acknowledge the said Assignment to be the act and deed of Chevy Chase Services, Inc., and that he signed the said Assignment in the name of Chevy Chase Services, Inc., as its President.

Given under my hand and seal this 3rd day of August, 1950.

/s/ Louise A. Justice
Notary Public

DISTRICT OF COLUMBIA, ss:

I, Jean C. Maddox, a Notary Public in and for the District of Columbia, do hereby certify that Mabel L. Marceron, lessor under the terms of the hereto annexed deed of lease bearing date on the 15th day of October, 1945, and acceptor under the foregoing Assignment of Lease, personally appeared before me in said District, being personally well known to me as the person who executed the said Acceptance of Assignment of Lease and acknowledged the same to be her act and deed.

Given under my hand and seal this 9th day of August, 1950.

/s/ Jean C. Maddox
Notary Public
Commission expires:
May 14, 1953

90

DISTRICT OF COLUMBIA, ss:

I, Louise A. Justice, a Notary Public in and for the District of Columbia, do hereby certify that Ernest A. Adams and James E. Betts, lessees under the terms of the hereto annexed deed of lease bearing date on the 15th day of October, 1945, and assignors under the foregoing assignment of lease, personally appeared before me in said District, being personally known to me as the person who executed the said assignment of lease and acknowledged the same to be their act and deed.

Given under my hand and seal this 3rd day of August, 1950.

/s/ Louise A. Justice
Notary Public

DISTRICT OF COLUMBIA, ss:

I, Louise A. Justice, a Notary Public in and for the District of Columbia, do hereby certify that Jas. E. Betts, President of Chevy Chase Services, Inc., assignee to the foregoing Assignment of Lease, personally appeared before me in said District, being personally well known to me as the President of Chevy Chase Services, Inc., and as the person who executed the foregoing Assignment of Lease and acknowledge the said Assignment to be the act and deed of Chevy Chase Services, Inc., and that he signed the said Assignment in the name of Chevy Chase Services, Inc., as its President.

Given under my hand and seal this 3rd day of August, 1950.

/s/ Louise A. Justice
Notary Public
Commission expires: Oct. 31, 1951

DISTRICT OF COLUMBIA, ss:

I, Jean C. Maddox, a Notary Public in and for the District of Columbia, do hereby certify that Mabel L. Marceron, lessor under the terms of the hereto annexed deed of lease bearing date on the 15th day

of October, 1945, and acceptor under the foregoing Assignment of Lease, personally appeared before me in said District, being personally well known to me as the person who executed the said Acceptance of Assignment of Lease and acknowledged the same to be her act and deed.

Given under my hand and seal this 9th day of August, 1950.

/s/ Jean C. Maddox
Notary Public
Commission expires: May 14, 1953.

---

91 Assignment of Lease:

We, Ernest A. Adams and James E. Betts, of the District of Columbia, the lessees named in the foregoing lease from Mabel L. Marceron, dated October 15, 1945, in re Lot 2 in Square 1666, in consideration of $1.00 and other valuable considerations and of the covenants hereinafter contained, do hereby assign, transfer and set over to Chevy Chase Services, Inc., the said lease, the premises hereby demised and all right, title and interest in and under the same, and Chevy Chase Services, Inc., the said assignee, in consideration of the foregoing assignment, hereby covenants with the said assignor that it will pay the rent which may hereafter become due according to the terms of said lease and perform all the covenants and stipulations in said lease which are to be performed by the lessee.

IN WITNESS WHEREOF we have hereunto set our hands and seal this 3rd day of August, 1950.

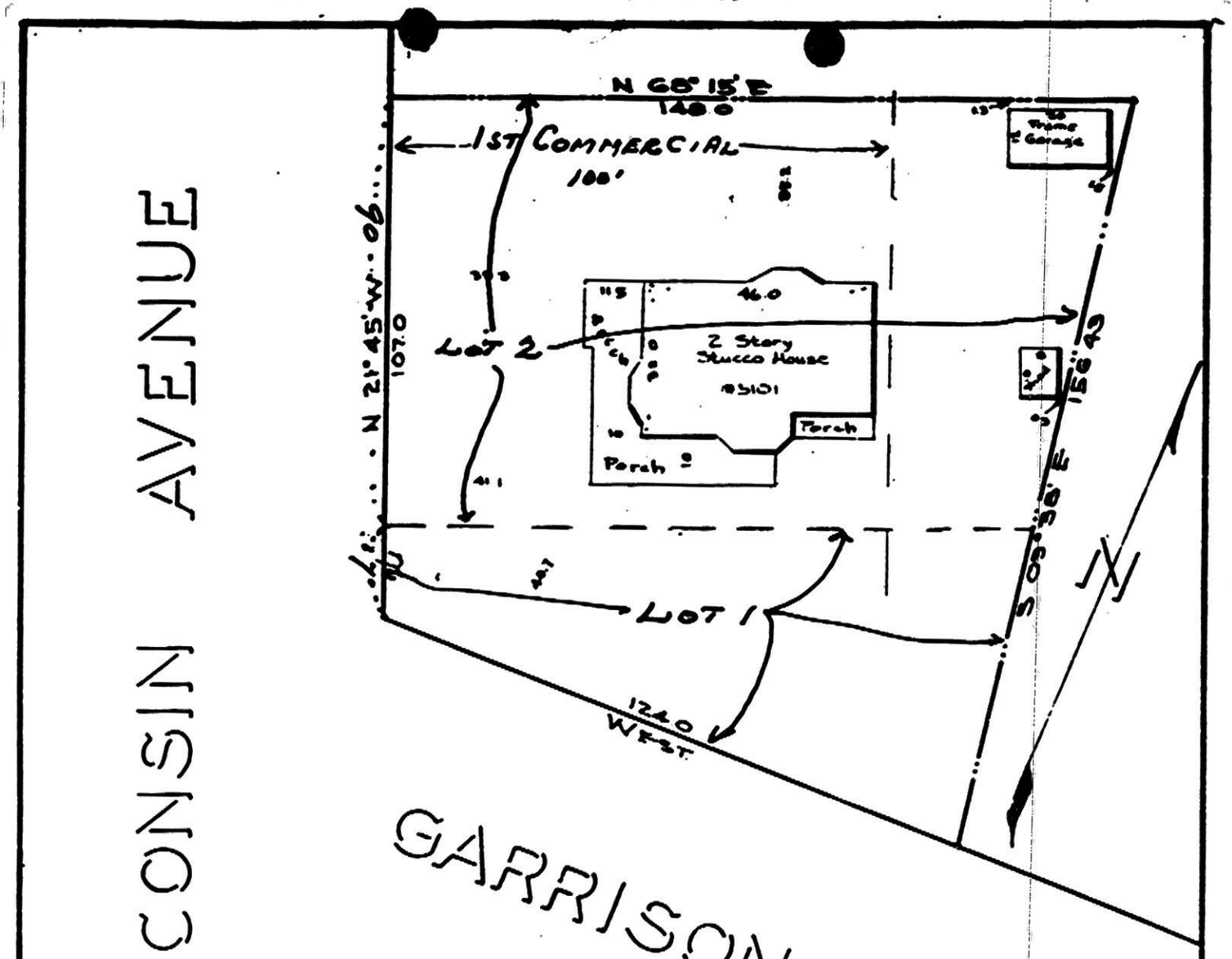
Assignor /s/ Ernest A. Adams (SEAL)
/s/ Jas. E. Betts (SEAL)

Assignee /s/ Jas. E. Betts, Pres. (SEAL)
Chevy Chase Services, Inc.

Acceptance of Assignment:

I, Mabel L. Marceron, the lessor named in the foregoing lease, hereby assent to the above-written assignment thereof, and accept the above assignee, Chevy Chase Services, Inc., as lessee under the terms of said lease; said assignment, however, in no wise shall release or discharge the said Ernest A. Adams and James E. Betts from any liabilities or obligations under said lease.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 9th day of August, 1950. /s/ Mabel L. Marceron



I HEREBY CERTIFY THAT THE PLAT HEREON DELINEATED IS A CORRECT PLAT OF PARCEL 25/66 IN SQUARE 1666, IN THE CITY OF WASHINGTON, AS THE SAME IS SHOWN ON PLAT FILED AMONG THE RECORDS OF THE SURVEYOR OF THE DISTRICT OF COLUMBIA; THAT THERE ARE NO ENCROACHMENTS FROM ADJOINING PROPERTIES; AND THAT THE LOCATION OF BUILDINGS SHOWN IS AS DETERMINED BY ACTUAL MEASUREMENT MAY 7, 1945.

Ralph Moore Berry

RALPH MOORE BERRY, SURVEYOR
75 CONNECTICUT AVENUE
KENSINGTON, MARYLAND

SCALE: 1" = 30'

Exh D

28

93 [Filed November 28, 1955]

October 10, 1955

Mr. Frederick Stohlman
Union Trust Building
Washington, D. C.

Dear Mr. Stohlman:

After diligent study of the present fair market value of lots 1 and 2 square 1666, upon the assumption that they are in the same ownership and have no buildings or structures upon them, we have unanimously agreed that the overall valuation of the 17,480 square feet involved is $109,909.00. Of this we allot $7.00 per square foot or $35,203. to lot 1 (the corner) and $6.00 per square foot or $74,706 to lot 2.

Applying to these figures the prescribed rental formula we have-

Lot (1)

20% of $35,203 ($7040.60) capitalized at 8% = $563.24 per annum or $46.93 per month*
*lease prescribes $66.66 per month minimum.

Lot (2)

80% of $74,706. ($59,764.80) plus $7000 for improvements = $66,764.80. This capitalized at 8% is $5341.18 per annum or $445.09 per month.

We certify that we have no present or contemplated interest in the property appraised and that our employment in and compensation for making this appraisal are in no manner contingent upon the values reported.

Yours very respectfully,

/s/ Frank M. Doyle

/s/ Thomas M. Walsh

/s/ Robert W. Savage

cc: Mr. James E. Betts

104

EXHIBIT A

October 17, 1955

(carbon sent to James E. Betts)

Mr. Frank M. Doyle
927 15th Street, N. W.
Washington, D. C.

Mr. Thomas M. Walsh
815 11th Street, N. W.
Washington, D. C.

Mr. Robert W. Savage
514 Union Trust Building
Washington, D. C.

Gentlemen:

Your appraisal, dated October 10, 1955, of values of Lots 1 and 2 in Square 1666 and the computation of rents are not in accordance with the provisions of the leases.

The lease for Lot 1 provides that "The appraisers shall determine the then fair market value of the leased premises, including the ninety (90) foot wide lot abutting the North line of the ground demised under this lease, upon the assumption that the said abutting lot is subject to no restriction upon its use, for its most advantageous use or uses, and upon the further assumption that the land has no buildings or structures upon it."

The lease for Lot 2 provides "The appraisers shall determine the then fair market value of the leased premises for its most advantageous use or uses, including the lot at the corner of Garrison Street and Wisconsin Avenue, Northwest, upon the assumption that said corner lot is in the same ownership as the leased premises and can be jointly used therewith for any lawful use or uses, and that said lot is subject to no restriction upon its use, and upon the further assumption that the land has no buildings or structures upon it, and shall add to such land value the sum of Seven Thousand Dollars ($7,000.00) as the assumed value of the building ....".

Hence, Lots 1 and 2 should be appraised as one parcel in one ownership; then 80% of that valuation allocated to the valuation on Lot 2 and 20% to Lot 1. The annual rental of Lot 2 is 8% of said land value, plus $7,000.00 for improvements, and for Lot 1, 8% of said land value.

105 What you appraisers have done is to appraise each lot separately, placing a $7.00 per square foot valuation on Lot 1 and $6.00 per square foot valuation on Lot 2, rather than follow the provisions of the leases that the lots are to be appraised as one parcel without any restrictions.

After arriving at a separate value for each lot, for some reason or other you reduced this valuation in the case of Lot 1 to 20% and based the rent on an 8% of 20% of the value of the lot, and in case of Lot 2 to 80% and added $7,000.00 for improvements and based the rent on an 8% of 80% of the value of Lot 2 plus $7,000.00.

If you assume that the value of Lot 1 is $35,203.00 and that Lot 2 is $74,706.00, a total of $109,909.00 for the whole, and that this latter figure is a fair appraisal for the two lots treated as one parcel, then 80% of that value of $109,909.00 should be allocated to Lot 2, namely $87,927.20, and 20% of this figure of $109,909.00, namely, $21,981.80 allocated to Lot 1.

With a valuation of $21,981.80 for Lot 1, 8% is $1,758,544, the annual rental, and $146,55, monthly rental. With a valuation of $87,927.20 for land in Lot 2, plus $7,000.00 for improvements, a total of $94,927.20, 8% of this amount is $7,594.176, the annual rental, and monthly rental, $632.84.

You will note that the lease for Lot No. 1 provides a total rental of $8,000.00 for the ten years; Lot No. 2 for $32,000.00 for the ten years, or a total of $40,000.00; 80% of this rental was charged to Lot No. 2 and 20% to Lot No. 1. The manner in which you gentlemen have proceeded throws this 80-20% out of alignment.

Accordingly it is requested that you give further consideration to this matter and arrive at the proper rental value following the procedure as outlined in the leases.

Please let me have an immediate reply,

FS:jt

Yours very truly,

107

EXHIBIT B

October 19, 1955

Mr. Frederick Stohlman
Union Trust Building
Washington, D. C.

Dear Mr. Stohlman:

With reference to your letter of October 17th we thought we had made it clear in our report that the present fair market value of the 17,480 square feet involved (lots 1 and 2 appraised as one parcel in one ownership) was in our judgment $109,909.00. Only for the purposes of clarification and/or enlightenment did we break this down to $7.00 per square foot for the area of the corner (lot 1) and $6.00 per square foot for the interior (lot 2).

After repeatedly reading the leases, it was our interpretation both individually and collectively that in establishing rental value we were compelled to apply the following formula.

Lot (1)

20% of $35,203 ($7040.60)
capitalized at 8% = $563.24 per annum or $46.93 per month*
*lease prescribes $66.66 per month minimum.

Lot (2)

80% of $74,706 ($59,764.80) plus $7,000 for improvements = $66,764.80. This capitalized at 8% is $5341.18 per annum or $445.09 per month.

Obviously if our interpretation of the lease is in error and your interpretation can be maintained then the formula would be as follows:

Lot (1)

20% of $109,909.00 ($21,981.80) capitalized at 8% = $1,758.54 per annum or $146.55 per month.

108 Lot (2)

80% of $109,909.00 ($21,927.20 plus $7,000 for improvements a total of $94,927.20 capitalized at 8% = $7594.17 per annum or $632.84 per month.

Yours very respectfully

/s/ Robert W. Savage

/s/ Frank M. Doyle

/s/ Thomas M. Walsh

cc: Mr. James E. Betts

110

EXHIBIT C

November 25, 1955

Mr. Frederick Stohlman
Attorney at Law
Union Trust Building

Dear Mr. Stohlman:

Reference is made to leases, dated October 15, 1945, concerning Lots 1 and 2 in Square 1666.

I and the other 2 appraisers appraised the value of Lots 1 and 2 according to our interpretation of the leases and arrived at the same construction of the leases. We were concerned when we noticed that the new rental of Lot 1 would be less than the existing amount. It was my opinion that the lease must have meant 20% and 80% of the total, for they had to be in relation to each other, since 100% represents the whole of anything. Therefore, we had discussed the desirability of including in our appraisal what we thought was intended, together with our interpretation. While the amount of rent on the corner would be less, we also noted that the total was increased from $333.32 to $511.75 per month.

In appraising each parcel, we followed wording of each lease, wherein we were to appraise the respective lots, including the other one, with the assumption that they were in one ownership and can be used together. We based our valuation on the whole, and while the 3 of us used different methods, we compromised our results. Our valuation of Lot 2 would have been less had we not done so, as this lot, if considered alone, had considerable residential land in the rear which was land-locked by the commercial land.

Each lease then goes on to say a certain percentage "<u>of the appraised value of the land,</u>" bearing in mind that we were dealing with 2 leases. If it were intended that the 20% and 80% were to be applied to both leases, it seems to me that it would have been wise to have added to "value of the land" of <u>Lots 1 and 2</u> in each lease.

Since the sum total of our valuation remains the same, it seems to me that the lessor and lessee should be able to arrive at the new rental if they intended that it be on the total valuation.

Cordially

/s/ Frank M. Doyle

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113 [Filed June 7, 1957]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHEVY CHASE SERVICES, INC., a corporation, trading as Chevy Chase Funeral Home, 5103 Wisconsin Avenue, N. W., Washington, D. C.,	:	
Plaintiff	:	Civil Action No. 5193-55
v.	:	
MABEL L. MARCERON, 4816 Alton Place, N. W., Washington, D. C.,	:	
Defendant	:	

OPINION

This is an action for declaratory judgment and injunction. The plaintiff is lessee and in possession of property located at 5103 Wisconsin Avenue, N. W., in the City of Washington. The property is known as Lot #1 and Lot #2 in Square 1666 in the District of Columbia. Both lots are owned by the defendant. The lessor gave lessee an option for an additional ten-year term which provides that the rent to be paid for the additional term shall be determined by appraisers as follows:

The lease for Lot #1 provides in Par. 3, p. 2:

"The appraisers shall determine the then fair market value of the leased premises, including the ninety (90) foot wide lot abutting the North line of the ground demised under this lease,

upon the assumption that the said abutting lot is subject to no restriction upon its use, for its most advantageous use or uses, and upon the further assumption that the land has no buildings or structures upon it. The rental for the ensuing ten (10) year period shall then be determined by the appraisers based upon a return to the lessor of eight per centum (8%) net per annum upon 20% of the appraised value of the land over and above real estate taxes."

114 The lease for Lot #2 provides in Par. 3, p. 2:

"The appraisers shall determine the then fair market value of the leased premises for its most advantageous use or uses, including the lot at the corner of Garrison Street and Wisconsin Avenue, Northwest, upon the assumption that said corner lot is in the same ownership as the leased premises and can be jointly used therewith for any lawful use or uses, and that said lot is subject to no restriction upon its use, and upon the further assumption that the land has no buildings or structures upon it, and shall add to such land value the sum of Seven Thousand Dollars ($7,000.00) as the assumed value of the building or buildings upon the land irrespective of the value of such structures or whether or not they then exist. The rental for the ensuing ten (10) year period shall then be determined by the appraisers based upon a return to the lessor of eight per centum (8%) net per annum upon 80% of the appraised value of the land plus $7,000.00 over and above real estate taxes."

Plaintiff gave due notice of the exercise of its option and appraisers were appointed in accordance with the terms of the leases and the appraisers made the following report:

"Mr. Frederick Stohlman
Union Trust Building
Washington, D. C.

Dear Mr. Stohlman:

After diligent study of the present fair market value of lots 1 and 2 square 1666, upon the assumption that they are

in the same ownership and have no buildings or structures upon them, we have unanimously agreed that the overall valuation of the 17,480 square feet involved is $109,909.00. Of this we allot $7.00 per square foot or $35,203 to lot 1 (the corner) and $6.00 per square foot or $74,706 to lot 2.

Applying to these figures the prescribed rental formula we have

Lot (1)
20% of $35,203 ($7040.60) capitalized at 8% = $563.24 per annum of $46.93 per month*, *lease prescribes $66.66 per month minimum.

Lot (2)
80% of $74,706. ($59,764.80) plus $7000 for improvements = $66,764.80. This capitalized at 8% is $5341.18 per annum or $445.09 per month.

115 We certify that we have no present or contemplated interest in the property appraised and that our employment in and compensation for making this appraisal are in no manner contingent upon the values reported.

Yours very trespectfully,
/s/ Frank M. Doyle
/s/ Thomas M. Walsh
/s/ Robert W. Savage

cc: Mr. James E. Betts

Defendant refused to accept the rental fixed by the appraisers and avers that the appraisers did not compute the rental value in accordance with the formulae in the leases.

The plaintiff prays the Court to adjudge that it has a good and valid lease for the extended term upon paying the rental determined by the appraisers.

The defendant contends that she is entitled to 8% on the total valuation and that the rental so determined should be allocated 20% to Lot #1 and 80% to Lot #2.

The plaintiff contends that defendant is entitled to only 8% per annum upon 20% of the appraised value of Lot #1 and 8% per annum on 80% of the appraised value of Lot #2.

There was little difference as to the law. The authorities cited show clearly that the report of the appraisers is final "unless they have mistaken their authority, departed from the submission, clearly misconceived their duties .....or have been moved by fraud or bias". Ice Service Co. v. Phipps, 245 N. Y. 393; 157 N. E. 506. There was no charge or evidence of fraud or bias. The appraisers were experienced and respected real estate dealers. The question was - Did they misunderstand the instructions in the leases and misconceive their duty? The parties disagree as to the meaning of the language used. The critical words are - "a return to the lessor of eight per centum (8%) net per annum upon 20% of the appraised value of the land" as to Lot #1,
116 and 8% " net per annum upon 80% of the appraised value of the land" as to Lot #2. The defendant construes the words "appraised value of the land" to mean the total appraisement of the whole tract consisting of Lots Nos. 1 and 2. The plaintiff construes the words to mean the appraised and apportioned value of the lot mentioned in each lease. That issue must be determined by the terms of the leases in the light of all the circumstances.

Such is the stuff of which litigation is made. The defendant contends that the prior negotiations and circumstances support her interpretation. And some of the conditions seem to do so. For instance, it is common practice to determine fair annual rent by figuring 8% of the market value of the leased property. But the inference to be drawn from that fact is weakened in this case by the provisions in the leases that $7, 000. 00 be added to the appraised value "as the assumed value of the building or buildings upon the land irrespective of the value of such structures or whether or not they then exist," and that the lessees must pay "real estate taxes".

Counsel for defendant argued that plaintiff's interpretation is contrary to the intention of the parties and "leads to an absurdity". But counsel for plaintiff countered by pointing out that the rent fixed by the appraisers, plus the taxes, is more than double the rent paid during the original term, and that the amount demanded by defendant is excessive and impossible for the plaintiff.

The evidence was clear that the two lots constituted one parcel of real estate and that the defendant had always considered it one parcel and wished to continue to consider it as such. The division into separate lots was made for the convenience of the lessees in order to meet requirements of the zoning regulations of the District of Columbia.

117 The plain meaning of the language used in the leases supports the interpretation of the plaintiff. The unanimity of the appraisers and their action is conclusive evidence of what the language meant to them. The evidence as to conditions and circumstances is not sufficient to vary or change the express terms.

If it was the intention of the lessor to allocate only the appraisal into 80% for one lot and 20% for the other lot, the lessor failed to carry that intention into the lease and the testimony and exhibits do not reveal that intention. If the language is indefinite, it must be construed favorably to the lessee. Nicolople v. Love, 39 App. D.C. 343.

The appraisers valued the property as a whole and allocated part of that valuation to one lot and part to the other lot and then determined that the rental to be paid to the lessor should be "eight per centum (8%) net per annum upon 80% of the appraised value of the land", that is, the land described in that lease (Lot #2); and "eight per centum (8%) net per annum upon 20% of the appraised value of the land" (Lot #1). The appraisers did exactly what the language of the leases specified they should do.

Judgment for plaintiff, findings of fact and conclusions of law may be prepared and submitted by counsel for plaintiff.

/s/ Robert N. Wilkin
United States District Judge

118 [Filed June 28, 1957]

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This cause came on to be heard at this term upon the pleadings, the testimony and the argument of counsel, whereupon the Court this 28th day of June, 1957, enters the following:

FINDINGS OF FACTS

1. Plaintiff is lessee and in possession of Lots 1 and 2 in Square 1666 in the District of Columbia known as 5103 Wisconsin Avenue, N. W. Both of the lots are owned by the defendant.

2. That the original leases for said lots 1 and 2 were entered into on October 15, 1945, and that each lot was demised by a separate lease. That each lease was for a term of ten years, expiring on November 30, 1955.

3. That each lease gave the lessee the option of renewing the term for two additional terms of ten years each at a rental to be computed by a committee of appraisers, in accordance with the formulae set forth in the leases; one appraiser to be appointed by the lessor, one by the lessee, and the third by the two so appointed, and that the rental determined by a majority of said committee of appraisers shall be binding upon the lessor and the lessee.

4. That the lessee elected to renew said lease prior to the expiration of the original term and so notified the lessor. That each

119 party appointed an appraiser, and the two so appointed selected a third to form the committee of appraisers. That all of said appraisers were experienced and respected real estate dealers.

5. The appraisers made the following report:

"After diligent study of the present fair market value of lots 1 and 2 square 1666, upon the assumption that they are in the same ownership and have no buildings or structures upon them, we have unanimously agreed that the overall valuation of the 17,480 square feet involved is $109,909.00. Of this we allot $7.00 per square foot or $35,203. to lot 1 (the corner) and $6.00 per square foot or $74,706 to lot 2.

Applying to these figures the prescribed rental formula we have

Lot (1)

20% of $35,203 ($7040.60) capitalized at 8% = $563.24 per annum of $46.93 per month*,
*lease prescribes $66.66 per month minimum.

Lot (2)

80% of $74,706. ($59,764.80) plus $7000 for improvements = $66,764.80. This capitalized at 8% is $5341.18 per annum or $445.09 per month.

We certify that we have no present or contemplated interest in the property appraised and that our employment in and compensation for making this appraisal are in no manner contingent upon the values reported.

Yours very respectfully,
/s/ Frank M. Doyle
/s/ Thomas M. Walsh
/s/ Robert W. Savage"

6. Defendant refused to accept the rental fixed by the appraisers and averred that the appraisers did not compute the rental value in accordance with the formulae in the leases.

7. That Lots 1 and 2 constitute one parcel of real estate and that the defendant has always considered it one parcel and wishes to consider it as such. The division into separate lots was made for the convenience of the lessee in order to meet requirements of the zoning regulations of the District of Columbia.

120 8. Appraisers valued the property as a whole and allocated part of that valuation to one lot and part to the other lot and then determined that the rental to be paid to the lessor should be "eight per centum (8%) net per annum upon 80% of the appraised value of the land", that is, the land described in that lease (Lot #2); and "eight per centum (8%) net per annum upon 20% of the appraised value of the land" (Lot #1). The appraisers did exactly what the language of the leases specified they should do.

CONCLUSIONS OF LAW

1. The appraisers did exactly what the language of the leases specified they should do and the parties are bound by the report and appraisal of the committee of appraisers.

2. The committee of appraisers correctly interpreted the formulae as set forth in the aforesaid leases and followed the express provisions thereof.

3. That, if the language of the leases is ambiguous or indefinite, it must be construed most favorably to the lessee.

/s/ R. N. Wilkin
Judge

[Certificate of Service]

---

121 [Filed June 28, 1957]

JUDGMENT

This cause came on to be heard in open Court at this term upon the pleadings, the testimony and argument of counsel, and after consideration thereof, it is by the Court, this 28th day of June, 1957,

ADJUDGED, ORDERED and DECREED, as follows:

1. That the plaintiff, Chevy Chase Services, Inc., a corporation, trading as Chevy Chase Funeral Home, has a good and valid lease of Lots 1 and 2 in Square 1666, improved by premises known as 5103 Wisconsin Avenue, Northwest, Washington, D.C., for a term of ten (10) years beginning December 1, 1955, upon paying rent in the amount of $511.75 per month to the lessor and the real estate taxes assessed against said real estate during said term.

2. That said tenancy is subject to all the provisions, terms and covenants of two certain leases made October 15th, 1945, copies of which are part of the record herein.

3. That the plaintiff recover its costs of the defendant.

/s/ R. N. Wilkin
Judge

122 [Filed July 26, 1957]

NOTICE OF APPEAL

Now comes the defendant, Mabel L. Marceron, in the above-entitled cause and notes an appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 28th day of June, 1957, in favor of the plaintiff, Chevy Chase Services, Inc., A Corporation, Trading as Chevy Chase Funeral Home, against the said defendant.

/s/ Frederick Stohlman

/s/ George H. Beuchert, Jr.
Attorneys for the Defendant,
Mabel L. Marceron

Cpy to:

Samuel J. L'Hommedieu
900 F Street, N. W.
Washington, D. C.

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

[Filed October 18, 1957]

Washington, D. C.

Monday, May 13, 1957.

JAMES E. BETTS

* * * * * *

DIRECT EXAMINATION

BY MR. L'HOMMEDIEU:

* * * * * *

Q. * * * what's your relationship to the Chevy Chase Services, Incorporated, the plaintiff? A. I am the President and Treasurer, stockholder.

* * * * * *

BY MR. L'HOMMEDIEU:

Q. You're still in possession, are you, Mr. Betts? A. Yes.

* * * * * *

JAMES E. SCHWAB

a witness called on behalf of the defendant * * * *

DIRECT EXAMINATION

BY MR. STOHLMAN:

Q. * * * Will you state your * * * occupation. A. * * * I am in the real estate business.

* * * * * *

Q. Did you have occasion to represent Mr. Adams, who is a member of the plaintiff corporation here, and Mr. Betts? A. * * * Mr. Adams and Mr. Betts came to my office and asked that I seek a location for them -- that they thought they wanted to go into the funeral home business.

* * * * * *

Mr. Stohlman: If Your Honor please, this written instrument evidently has some ambiguity about it, since the plaintiff does not agree with our contention, and a written contract can introduce evidence to help where there is ambiguity.

The Court: That's right.

* * * * * *

18 Mr. Stohlman: What did he do as a result of Adams and Betts asking him to locate a funeral site.

The Witness: Well, my first efforts were to find out just what was involved in locating a funeral home, and I discovered that the zoning regulations provided that --

* * * * * *

19 "Hereafter, no undertaking establishment, crematory, or funeral parlor shall be established or enlarged in the first commercial district on any street if any of the property on either side of such street, between the two intersections of the streets on either side of the proposed establishments is in a residential district."

* * * * * *

20 BY MR. STOHLMAN:

Q. Did you submit as a result of your study, a proposal for a lease of this ground, or part thereof? A. Well, I first presented the owners with a contract of purchase by Adams and Betts, in which they agreed to buy the north 90 feet of parcel 25 over 66, I believe it was known as at that time. The reason for purchasing the north 90 feet was to separate the property so that it would have no frontage on Garrison Street, because Garrison Street between 43d, I think it is, and Wisconsin Avenue, have residentially zoned property on both sides of the street, and therefore a permit would not be issued for a funeral parlor on the corner property as such.

21 The offer they made to me for the north 90 feet was $40,000.

* * * * * *

22 Q. The sales contract, I take it, was not accepted? A. It was not accepted by the owner, no, sir.

* * * * * *

Q. Did there come a time when you negotiated a lease? A. As a result of my conversations with Adams and Betts, I submitted for them to the owner a proposal for a lease.

Q. For what ground? A. On the north 90 feet was the first

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Q. For what ground? A. On the north 90 feet was the first

proposal. That rental was to be at $4000 a year, the owner was to pay the taxes, the tenant was to make all repairs to the property. That proposal was in turn submitted by the owner to her attorney Mr. James C. Wilkes. Mr. James C. Wilkes prepared a lease along the lines set forth in my letter, and that lease in turn on -- the contract was made with me on October -- in October, and the lease proposal was made on November 16th by letter.

Q. What year? A. 1944. Mr. Wilkes prepared leases on
23 December 6, 1944, and those leases were transmitted to Mr. Betts on December 7th, 1944.

Q. Now, in what manner was the $4000 rental arrived at? A. In the discussion of the price we paid for the property, after the contract was signed and refused, I was authorized to increase the offer verbally to $42,500, and that value was the basis for the lease.

The $4000 was arrived at by figuring the ground as being worth $2.50 a foot.

Q. What ground? A. The entire property.

* * * * * *

Q. So that included what is now lots 1 and 2? A. That's right.

* * * * * *

A.** The reason for that was because the tenants did not want any use made of the corner lot, because it would obstruct the view and make their place less impressive.

That value came to $43,560, and we figured 8% on that, which gave $3484.80. The taxes at that time were $352.21. That made a total of $3837.01. The figure of $4000 was arrived at in order to make
24 some allowance for an increase in taxes during the ten years. The taxes were to be paid by the lessor during the first ten years. That's the background to the $4000 figure.

* * * * * *

Q. Now, did there come a time that you sub-divided it, or had it sub-divided? A. *** that first lease, of course, only covered the inside lot, the first draft. And subsequent negotiations developed the

fact that because the inside piece had a house on it, and the lessees intended to remodel that house, and the provision-for-renewal clause provided that there was to be an appraisal, and an 8% return on that appraisal, decided that because of their improvements, the house might be appraised at more than it was worth at the time the lease was made. Therefore, we agreed that a set value would be placed on the house of $7,000, and that the land then would be appraised, and $7000 added.

* * * * * *

25 A. * * *

During that same period, these leases had been submitted to attorneys for the lessee, and from some place, the suggestion came that they would not be very secure unless they had some direct control of the corner lot.

So then it was decided that the property would be divided and two different leases made, and the rental divided between the two properties. That was done. We secured a survey by an engineer to locate exactly where the house was, and then applied on July 18, 1945 -- some 8 months later -- for the District Surveyors' Office to prepare a plat of sub-division. The plat of sub-division was then held in abeyance until the leases were drawn and signed.

The first set of leases were signed on the 17th of August before there was any sub-division, for the reason that Mrs. Marceron did not want the property sub-divided, and then find she didn't have a tenant. The lessees had signed. Those leases provided for a metes and bounds description on both parcels. The rent division was $3200 to the north 90 feet, which had the house, and $800 to the corner lot that was a division of 20% to the corner, and 80% to the interior lot. * * *

* * * * * *

28 BY MR. STOHLMAN:

Q. As a result of the signatures of Mr. Betts and Mr. Adams to these proposed leases of August 17, 1945, Lot 801 or parcel 25 over 1666, sub-divided? A. The sub-division was recorded on September 28th, 1945.

Q. That provides for Lots 1 and 2? A. Right, yes, sir.

Q. What is the frontage of Lot 2, if you know? A. 90 feet.

Q. And the remaining is? A. Seventeen feet.

* * * * * *

Q. Now, did you prepare those leases, Mr. Schwab, the present leases that were introduced into evidence by the plaintiff, those dated October the 15th, 1945? A. I'm a little at a loss as to exactly how to answer that. They were -- in their final draft they were prepared by me from the draft that Mr. Wilkes had originally drawn. Mr. Wilkes looked the leases over and made notations which were followed. I did the mechanical work more or less.

29 * * * * * *

CROSS EXAMINATION

BY MR. L'HOMMEDIEU:

Q. Mr. Schwab, you're a realtor? A. Yes, sir.

Q. And who's been paying you for your services in this case? A. The Marcerons, the owner of the property, the lessor.

* * * * * *

30 Q. And the final negotiations -- these preliminary negotiations, then, culminated in the final leases being drawn. Is that correct? A. Yes, sir.

Q. The leases which are offered in evidence here dated October 15th, 1945. A. Right.

Q. And during all this period, you were paid by Mrs. Marceron, is that correct, the lessor? A. Right.

* * * * * *

31 Mr. Stohlman: May I ask one further question, Your Honor?

The Court: Yes.

BY MR. STOHLMAN:

* * * * * *

32 Q. Do you recall why you sub-divided rather than to have by metes and bounds.

* * * * * *

The Witness: The reason for the sub-division rather than a metes and bounds description was so that the application for the permit would show without question that they were applying for a permit to do business on a piece of property that had no frontage on a street that also had residentially-zoned property fronting on the same street. That applied merely to Lot 2, because Lot 1, they had no right to conduct a funeral home on Lot 1 under the lease.

* * * * * *

33 Q. * * * I take from your testimony, it was at all times desirable to have both throughout the entire property tied up as one. A. That was one of the obstacles I had in making the lease, in that the Marcerons were fearful that in some way they would suffer a disadvantage if the property were divided in some way. They insisted that each lease should be dependent upon the other. If one was vitiated, the other one would be vitiated, and that everything should be tied together, and they should remain that way for purposes of -- in order to maintain its value was the real reason. They wanted no division made whatsoever.

* * * * * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED FEB 11 1958
Joseph W. Stewart
CLERK

No. 14,199

MABLE L. MARCERON,

Appellant,

v.

CHEVY CHASE SERVICES, INC.,
A Corporation, trading as Chevy
Chase Funeral Home,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAMUEL J. L'HOMMEDIEU,
Washington Loan & Trust Bldg.,
Washington, D. C.

Attorney for Appellee

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

APPELLEE'S STATEMENT OF QUESTIONS PRESENTED

1. The first question is whether in a case where parties have executed two leases for a term of years and which are specific in every detail and import a complete legal obligation, and which provide that the tenant has the option to renew at a rental to be fixed by a committee of appraisers, and that the rental so fixed shall be binding on both parties, and that where the option is exercised and a committee of appraisers appointed and they have fixed the rental for the new term by unanimous agreement, can the lessor refuse to accept the same and demand a higher rental, in the absence of fraud or misconduct?

2. In such a case, if the lessor can refuse to accept the rental as determined by said appraisers, did the appraisers properly perform their duties in this case under the provisions of said leases?

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,199

MABEL L. MARCERON,

Appellant,

v.

CHEVY CHASE SERVICES, INC., A Corporation, trading as Chevy Chase Funeral Home,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

On October 15, 1945, Mabel L. Marceron, the appellant, entered into two certain leases with one Ernest A. Adams and James E. Betts for the rental of Lot 1 and 2 in Square 1666 in the District of Columbia, (J. A. 1, 2). Each of said leases was full and complete in every detail; the lease for Lot 1 covered 10 pages of the Joint Appendix and for Lot 2, 12 pages of the Appendix. (J. A. 12 to 32). The term demised under both leases was ten years, with two additional terms of ten years each at the option of the lessees. (J. A. 12, 22, 23). Said leases were prepared by the attorney for the appellant (J. A. 22).

The rental for Lot 1 for the term demised was $8, 000 and for Lot 2, $32, 000 (J. A. 12, 22).

The lease for Lot 1 provided that, "The rent for the periods following the expiration date hereof in 1955, * * * shall be determined by a committee of appraisers consisting of one named by the lessees, * * * one named in writing by the lessor * * *, and a third selected by such two. A determination in writing by a majority shall be binding upon the lessees and the lessor as to the question of the rental value of the leased premises as provided herein." (J. A. 13). A similar provision was contained in the lease as to Lot 2 (J. A. 23). The lease for Lot 1 also provided that, "The appraisers shall determine the then fair market value of the leased premises, including the ninety (90) foot wide lot abutting the North line of the ground demised under this lease, upon the assumption that the said abutting lot is subject to no restriction upon its use, for its most advantageous use or uses, and upon the further assumption that the land has no buildings or structures upon it. The rental for the ensuing ten (10) years shall then be determined by the appraisers based upon a return to the lessor of eight per centum (8%) net per annum upon 20% of the appraised value of the land over and above real estate taxes." (J. A. 14)

The lease for Lot 2 provided, "The appraisers shall determine the then fair market value of the leased premises for its most advantageous use or uses, including the lot at the corner of Garrison Street and Wisconsin Avenue, Northwest, upon the assumption that said corner lot is in the same ownership as the leased premises and can be jointly used therewith for any lawful use or uses, and that said lot is subject to no restriction upon its use, and upon the further assumption that the land has no buildings or structures upon it, and shall add to such land value the sum of Seven Thousand Dollars ($7, 000. 00) as the assumed value of the building or buildings upon the land irrespective of the value of such structures or whether or not they then exist. The rental for the ensuing ten (10) year period shall then be determined by the appraisers based upon a return to

the lessor of eight per centum (8%) net per annum upon 80% of the appraised value of the land plus $7,000.00 over and above real estate taxes." (J. A. 24.)

The Lessees took possession of said premises under said leases and thereafter, for value received, on August 3rd, 1950 duly assigned said leases to the present appellee. These assignments were duly consented to by the appellant (J. A. 34, 35 & 36).

Thereafter and prior to the expiration of the term demised the appellee elected to renew said leases for an additional term of ten (10) years and so advised the appellant (J. A. 2). Both parties appointed appraisers, and they selected a third to form a Committee of Appraisers as provided in said Leases (J. A. 2). Each of said appraisers were men of long experience in dealing with real estate and appraising the same in the District of Columbia (J. A. 2).

The Committee of Appraisers thereafter filed their unanimous report or award fixing the fair market value of the respective lots and the rental value for the extended term (J. A. 3 & 38).

The appellee, on November 22, 1955, duly tendered to the appellant the sum of $511.75 for the rent of the demised premises for the month of December, 1955, as determined by the said appraisers, plus the sum of $49.10, representing the real estate taxes for that month and the sum of $1,248.92, representing seven times the additional monthly rent as provided by said Leases (J. A. 3), which the appellant acting through her agent, James E. Schwab, refused to accept (J. A. 4).

SUMMARY OF ARGUMENT

I

The admitted facts in this case show that the appellant and appellee's assignor entered into two certain leases on the 15th day of October, 1945 for Lot 1 and 2 in Square 1666; the term was for a period of ten years, commencing on the 1st day of December, 1945.

Each lease provided that the tenant, (appellee) had the option of renewing for an additional period of ten years, and that the rent for said term shall be determined by a Committee of Appraisers, one to be appointed by each of the parties, and the third by the two so appointed. The leases also provided that the rental so fixed by the Committee of Appraisers shall be binding on the parties.

The appellee elected to renew, and the appraisers were appointed in accordance with the provisions of said leases. The Committee of Appraisers fixed the rent and filed their report. The appellee tendered the rent as determined by the appraisers, to the appellant, who refused to accept the same and demanded more.

That the parties, having by their solemn covenant, submitted to a Committee of Appraisers of their own choosing, the question of the rental value for the extended term, and having covenanted that the said Committee's decision shall be binding on them, cannot thereafter, in the absence of fraud or misconduct, question the same.

That in such a case, the decision of the Committee is binding on the parties, both as to the law and the facts.

II

The evidence established that the appraisers properly performed their duties and correctly followed the provisions of the leases in determining the rental value of the property in question. Each of the leases provided that the rental was to be "based upon a return to the lessor of eight per centum (8%) net per annum upon" a certain percentage of the appraised value of the land over and above the real estate taxes. One of the leases also provided that $7,000 was to be added to the value of the land as the assumed value of the structures thereon, whether they existed or not. The appraisers diligently studied the present fair market value of the lots and properly established the rental for the property.

III

That, if there be any uncertainty or ambiguity in the provisions relating to the renewal of said leases the construction will be in favor of the tenant rather than in favor of the landlord. This is especially true where the lease is prepared by the landlord.

IV

Appellant's argument as to the intention of the parties is based on inadmissible evidence and is in violation of the parol evidence rule.

V

Assuming arguendo that the testimony of appellant's only witness was admissible,it does not indicate the intention of the parties, nor could it,as it constituted but recollections of preliminary negotiations which are deemed merged in the final agreement of the parties,by which they are bound.

ARGUMENT

I

The Law Is Well Settled That Where Parties Have Submitted A Matter to Appraisers and Have Agreed to be Bound by Their Appraisal, the Courts Will Sustain the Same in the Absence of Fraud or Misconduct on the Part of the Appraisers.

Cases similar to the one now here have been before the courts on many occasions and the courts have invariably sustained the decisions of the appraisers or arbitrators, as the case may be, in the absence of fraud or misconduct. From these decisions it appears that, if the appraisers acted fairly and honestly within the scope of their authority, their decisions will be sustained, even though they have made errors, either of law or fact, and their findings will be binding on both parties, even in the absence of an express stipulation to that effect.

The case of Moore vs Eadie, 245 N. Y. 166, 156 N. E. 653, is quite similar to the facts in this case. There a lease was made for a period of 21 years, which provided among other things, that, if the owner elected not to renew, he would pay the tenant the value of the building on the leased premises, the value of the building to be fixed by a Committee of Appraisers. The owner elected not to renew and the appraisers fixed the value of the building at $7, 000. The owner refused to pay claiming that the method used in fixing the amount was not in accordance with the terms of the lease and filed suit to have it set aside. The lower court set it aside, but on appeal the Court in reversing, said:

> "Appraisals such as this are not to be set aside, merely because the valuation is higher or lower than that which a court may determine after a trial. It is to avoid litigation that the parties make appraisal agreements final. Something is expected to be charged up to profit or loss. Both time and money are expected to be saved by the determination of appraisers. Judge Peckham of this court in Perkins vs Giles, 50 N. Y. 228, said, 'that awards of arbitrators would not be set aside for mere errors of judgment or because the arbitrators decided wrongly as to the law or the facts of the case; and in Masury vs Whiton, 111 N. Y. 679, 18 N. E. 638 it was said, 'The award of an arbitration cannot be set aside for mere error of judgment as to the law or facts of the case submitted to him. If, in making his award, he keeps within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his award, then his award is unassailable.'
>
> "Both of these cases were cited in Matter of Burke, 191 N. Y. 437, 84 N. E. 405 to sustain this statement of law:
>
> 'The award thereunder is unassailable upon the ground that errors of law or fact were committed.
>
> "For it to be assailable at all, a ground must be found for charging the arbitrator with some misconduct, or with fraud, or with having exceeded his powers, or for the charge that the award, on its face, shows some mistake in figures or in description or some imperfection not going to the merits."

And further the Court said:

"The trial judge may have believed the witnesses for the plaintiffs as to valuation instead of the witnesses for the defendant; but the parties by the lease had submitted this question for final determination to appraisers, not to the courts."

The leading case on this point is Burchell vs Marsh et al., 58 U. S. 344, 349, 15 L. Ed. 96, where a suit was filed to set aside an award of arbitrators. The lower Court set the award aside and on appeal the Supreme Court, in reversing, said (58 U. S. at 349):

"Arbitrators are judges chosen by the parties to decide the matters submitted to them finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If an award is within the submission and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or fact. A contrary course would be a substitution of the judgment of the Chancellor in place of the judges chosen by the parties and would make an award the commencement, not the end of litigation.

The law is aptly stated in 5 C. J. 179, as follows:

"An honest mistake of judgment in the conclusion of arbitrators which does not exceed the bounds of the submission is not, as a general rule, ground for impeachment of the award, whether the alleged mistake is one of fact or of law, or of both. Although the court might have rendered a different decision, it will not substitute its decision for that of the arbitrators."

In Patriotic Order, etc., vs Hartford Fire Ins. Co., 305 Pa. 107, 157 Atl. 259, 261, the parties were unable to agree upon a loss and entered into an appraisal agreement. Each party appointed an appraiser, and they in turn, appointed a third. The majority made an award, which was challenged. The court refused to set aside the award, and said:

"If an award could be set aside under such testimony as was here offered, then the finding of appraisers where the determination is the value of property could be set aside in every case in which one of the arbitrators should testify that he had come to a mistaken conclusion as to its value and had reached the opinion that it was less or more. If this were the rule

there would be complete instability in arbitration awards. The mistakes which will avoid an award are in a very limited class. 'An honest mistake of judgment in the conclusion of arbitrators which does not exceed the bounds of the submission is not, as a general rule, ground of impeachment of the award, whether the alleged mistake is one of fact or of law, or of both. Such errors are among the contingencies which parties assume when they select such tribunals."

And further the Court said:

"The general rule undoubtedly is that, unless restricted by the agreement of submission, arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside for mistake in either. And this is the reasonable view, for a contrary holding would mean that arbitration proceedings, instead of being a quick and easy mode of obtaining justice, would be merely an unnecessary step in the course of litigation, causing delay and expense, but settling nothing finally."

In the case of The New York and Cumberland Railroad vs Meyers, 59 U.S. 246, 253, 15 L. Ed. 380, which was an action for damages for breach of a contract and was referred to an arbitrator before trial, the Supreme Court in refusing to set aside the award, said (59 U.S. at 253):

"This conclusion of his is a final decision on the question, for this court cannot, revise his mistakes, either of law or fact, if such had been established."

In the matter of Bailey, Adm. vs District of Columbia, 9 App. D.C. 360, the court in sustaining a decision of a referee, said (9 App. D.C. at 372):

"Much agrument is expended on behalf of the defendant to show that from the evidence the referee's award or finding was not warranted. But the evidence taken before the referee was not before the court below, and is not before us; and no inference whatever of the propriety or impropriety of the award can be drawn from it. That award or report, whichever it be or be called, must be judged by its own findings of facts and its legal conclusions therefrom, and not by extraneous testimony."

And further the Court said:

"The question is not whether the referee's report is correct or not, but whether there was an agreement to submit to arbitration, an actual arbitration in pursuance of it,

> and an award thereupon by the arbitrator. These are all matters of fact for determination by a jury; and they have all been resolved by the jury in favor of the plaintiff. We would not be disposed to question the justice of their verdict, even if we had a right to do so. The argument upon the merits of the plaintiff's original claim, even if it were well founded in fact, has no place in the discussion before us. If we could admit such discussion, arbitration and award would be a farce, and even reference to a referee under statute or rule of court would be a meaningless formality."

The above case was reversed by the Supreme Court solely on the ground that the District of Columbia had no power to submit to arbitration, 171 U.S. 161.

In the case of Ice Service Co. vs Phipps Estates, 245 N.Y. 393, 157 N.E. 506, a lease was made in 1882 and extended in 1902 for a term of 21 years. The lessor had the option of renewing or terminating the lease; if terminating, the lessor was to pay the lessee the fair value of the buildings erected by the lessee. If the parties could not agree on the value, each was to appoint an appraiser, and, if the two appraisers were unable to agree, they were to select a third, and the decision of any two of said appraisers as to "the value of the buildings or the amount of such annual rent shall be final and conclusive." The lessor decided not to renew and each party appointed appraisers, and they being unable to agree, appointed a third. The appraisers made their findings and suit was filed to set it aside. The Court of Appeals in sustaining the award and reversing the lower Court, said (157 N.E. at 508):

> "It is not necessary for appraisers to fix a value which can be sustained and justified by evidence in a court of law. Their valuation is final by agreement of the parties if they have acted reasonably, fairly and in an honest attempt to get the real and true valuation. Their conclusion cannot be set aside by a court of equity merely because real estate experts on a hearing in court fix a higher valuation, or because the amount is higher or lower than we or other judges would be inclined to allow. The parties have made the appraisers the judges -- the court of last resort -- unless they have mistaken their authority, departed from the submission, clearly misconceived their duties, acted upon some fundamental and apparent mistake or have been moved by fraud or bias."

This same question was before this Court in the case of United States vs Mason, 33 App. D.C. 350, and this Court said:

> "Two mistakes are alleged: one, as to the value of the horse, which is a mistake of fact; the other, as to the fault or negligence of the claimant, which is a question of mixed law and fact. But these were the very questions which the Auditor was 'authorized and directed to examine into, ascertain, and determine', and the determination of which was made conclusive. There is no allegation of fraud practiced upon him by which his mistakes, if any, were superinduced. Hence, the so-called mistakes of law and fact under which the warrant was issued and paid, in accordance with his determination, amount to errors of judgment committed in that determination and nothing more. It is settled that an award of arbitrators acting under due authority can not be impeached in a suit brought for alleged mistake therein. Burchell vs Marsh, 17 How. 344, 350, 15 L. ed 96, 99. In that case it was said by Mr. Justice Grier: 'Courts should be careful to avoid a wrong use of the word 'mistake', and, by making it synonymous with mere error of judgment, assume to themselves an arbitrary power over awards.' See also, York and Cumberland R. R. vs Meyers, 18 How. 246, 253, 15 L. ed 380, 383. For as strong a reason, the final determination of a special tribunal, created by law and vested with jurisdiction in a particular case, can not be impeached in an action like this for error of judgment, on the ground of mistake."

From the aforegoing authorities it can readily be seen that the courts from the Supreme Court down have refused to interfer where the parties have submitted a question of appraisal to arbitrators or appraisers and made their decision binding on them, in the absence of fraud or misconduct. As a matter of fact, appellant cites no case to the contrary. The only case on this point from which appellant quotes is United States vs Farragut, 89 U.S. 406, 22 L.Ed. 879, evidently in the belief that the ruling in that case was contrary to the authorities herein cited. However, the Farragut case is not contra to these decisions as the arbitration agreement in the Farragut case specifically provided, that "either party had the right to appeal to the Supreme Court of the United States as from other decrees or judgments in prize cases." In the case at bar, the parties did

not provide for an appeal, but rather made the decision of the appraisers binding on both parties. In so doing they made the appraisers "the judges--to decide the matters submitted to them finally and without appeal". Burchell vs Marsh, supra. Or, as stated in Patriotic Order, etc., vs Hartford Fire Insurance Company, supra, "arbitrators are the final judges of both law and fact, and an award will not be reviewed or set aside for mistake of either."

Counsel in their brief quote from some cases on the law of the interpretation of contracts, with which the appellee does not disagree. Here however, the interpretation of the renewal clause was by the very provisions of the leases granted to the appriasers. This matter was submitted to their judgment and was made binding on both parties. As stated in Burchell vs Marsh, supra, they are "the judges -- to decide the matters submitted to them finally and without appeal".

Counsel also quote from Rheam vs Martin, 26 App. D.C. 181 and from Arsenault vs Angle, 43 A.2d 709 (Mun. Ct. App.) to the effect that questions of law are for the Court and questions of fact for the jury. Likewise these cases are not in point as here there was no jury impanneled to try any issue, but rather the matter was submitted to the Committee of Appraisers whose determination, as in Burchell vs. Marsh, supra, was to "be binding upon the lessee and the lessor as to the question of rental value of the leased premises as provided herein" (J. A. 13, 23). In the instant case the appraisers, after a diligent study, determined the amount of rent which was due pursuant to the terms of the leases. No fraud or misconduct is alleged and therefore no court should set aside the unanimous decision of the appraisers.

II

The Evidence Established that the Appraisers Properly Performed Their Duties and Correctly Followed the Provisions of the Leases in Determining the Rental Value.

Both leases provided that if the appellee should elect to renew the leases that the amount of the rent was to be determined by a Committee of Appraisers. As mentioned above this determination was to be binding upon both the appellee and appellant (J. A. 13, 23). But appellant now contends that the lower court erred in failing to hold that the appraisers had erroneously determined the amount of rent. Even if this question is open for argument it is apparent from the record that the appraisers strictly followed the express provisions of the leases.

Each lease provided that the rental was to be "based upon a return to the lessor of eight per centum (8%) net per annum upon" a certain percentage of the appraised value of the land over and above the real estate taxes (J. A. 14, 24). One of the leases also provided that $7,000 was to be added to the value of the land as the assumed value of the structures thereon, whether they existed or not. Appellant argues that the rent for each parcel of land was to be based upon a certain percentage of the appraised value of both parcels. The court below, the three appraisers and appellee disagree.

The report of the appraisers which is challenged reads in part as follows:

> "After diligent study of the present fair market value of lots 1 and 2 square 1666, upon the assumption that they are in the same ownership and have no buildings or structures upon them, we have unanimously agreed that the overall valuation of the 17,480 square feet involved is $109,909.00. Of this we allot $7.00 per square foot or $35,203. to lot 1 (the corner) and $6.00 per square foot or $74,706 to lot 2.
>
> "Applying to these figures the prescribed rental formula we have -
>
> "Lot (1)
>
> 20% of $35,203 ($7040.60) capitalized at 8% - $563.24 per annum or $46.93 per month*
>
> *lease prescribes $66.66 per month minimum.

"Lot (2)
80% of $74,706. ($59,764.80) plus $7000 for improvements = $66,764.80. This capitalized at 8% is $5341.18 per annum or $445.09 per month."

As pointed out in their report, the appraisers acted "upon the assumption they [the lots in question] are in the same ownership." Thus the appraisers complied with the terms of the leases and the appellant should not be heard to complain for she was benefited. Obviously, two lots which adjoin and which might be used as one unit are more valuable when appraised as if they were in the same ownership.[1] And the result, which nearly doubled the amount appellee had to pay, is logical because it places a small amount of rent upon the lot which can not be used in appellee's business (J. A. 57) and a larger amount of rent upon the other lot.

The leases do not, as appellant now contends, require that the rent for each lot be a certain percentage of the total appraised value of both lots. Such a contention would mean that appellee would have to pay $891.77 per month at the present time whereas it paid $333.33 per month before the option to renew was exercised and is presently paying $624.13 per month ($511.75 per month rent plus $112.38 per month in taxes (R. 56, 58)). If appellee had any idea that appellant's contention was correct it never would have exercised the option to renew.

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1 In this connection it is noted that after the appraisers filed their report the appellant had certain correspondence with them, and at the trial introduced a letter from Frank M. Doyle, who was one of the appraisers. (J.A. 42). This was objected to by the appellee. (R. 12, 13). If its purpose was to impeach the appraisers report, it was clearly inadmissible. Patriotic Order, etc. vs. Hartford Fire Insurance Company, supra, and Rust Engineering vs. Lehigh, 65 App. D.C. 77, 79 F. 2d 830. Since however counsel have set forth a part of said letter on page 7 of their brief, appellee would like to call the Court's attention to the paragraph immediately following the one quoted by the appellant, which is as follows: "In appraising each parcel, we followed wording of each lease, wherein we were to appraise the respective lots, including the other one, with the assumption that they were in one ownership and can be used together. We based our valuation on the whole, and while the 3 of us used different methods, we compromised our results. Our valuation of Lot 2 would have been less had we not done so, as this lot, if considered alone, had considerable residential land in the rear which was land-locked by the commercial land." (J.A. 42). It therefore appears that the valuation of Lot 2, which was $74,706, would have been less, if the appraisers had not assumed the lots were in the same ownership. Of course, the rent would have been less also.

If the parties had intended to arrive at the result now urged by appellant they would not have executed the present leases. They would simply have executed a lease or leases in which it was provided that the rent was to be based upon a return to the lessor of 8% upon the appraised value of the property in question. Nothing else would have been required.

III

Assuming Arguendo that the Leases are Ambiguous and Admit of Two Constructions it is Well Established That the One Most Favorable to the Lessee Must be Adopted.

If it is assumed that the leases are ambiguous and admit of more than one construction, as appellant argued in the Court below (J. A. 52), then the one most favorable to the lessee must be adopted. This rule of law is founded upon the principle that every man's grant is to be taken most strongly against himself. Nicolople vs Love, 39 App. D.C. 343; 68 A. L. R. 157; 35 C. J. Landlord and Tenant Sec. 125. In the Nicolople case this Court stated the rule as follows:

> "In the case at bar plaintiff prepared the lease, and though the language used in reserving to him the right to terminate the lease for the purpose of rebuilding is somewhat ambiguous, it will most reasonable admit of the interpretation we have given it, especially in the light of the rule that where a contract will admit of two constructions, either of which is reasonable, the one most favorable to the grantee must be adopted, on the principle that a man's grant shall be construed most strongly against himself."

The authors of American Law Reports in discussing the same question state the law to be as follows (68 A. L. R. 157):

> "As a general rule, in construing provisions of a lease relating to renewals, where there is any uncertainty, the tenant is favored, and not the landlord, since the latter, having the power of stipulation in his own favor, has neglected to do so, and also upon the principal that every man's grant is to be taken most strongly against himself. Launtz vs Kinloch Telep. Co. (1925) 239 Ill. App. 204; Edward vs Tobin (reported herein) ante, 152."

It is thus submitted that even if counsel for appellant was correct in informing the trial court that the leases were ambiguous (J. A. 52) they still must be construed in favor of the appellee (tenant).

IV

Appellant's Arguments as to the Intention of the Parties is Based Upon Inadmissable Evidence and is in Violation of the Parol Evidence Rule.

The Statement of the Case as set out by the appellant in her brief was taken almost exclusively from the testimony of James E. Schwab, the one and only witness called by appellant. This witness, who receives a commission as a real estate agent from the appellant and is consequently an interested witness, testified on May 13, 1957, as to his recollection of events that were supposed to have happened in 1944 and 1945, evidently upon the theory that the leases were ambiguous, or in an attempt to alter or vary the terms of the leases. His testimony, if offered for either of said purposes was inadmissible, and was objected to by the appellee. (R. 15, 16, 17, 18, 19, 21, 22, 25, 26, 27). As pointed out in Argument III, if the leases are ambiguous, the interpretation or construction in favor of the tenant will be adopted, and, if offered to contradict, add to or vary the terms of the leases, the evidence was inadmissible for as this Court said in Merritt v. Kay, 54 App. D. C. 152, 155:

> "The terms of the lease could not of course be contradicted, altered, added to, or varied by parol evidence, and the lease must for the purposes of this case be regarded as the complete and final agreement of the parties at the time it was executed as to all matters provided for therein or covered thereby."

V

Assuming Arguendo That the Testimony of Appellant's Only Witness Was Admissible it Does Not Indicate the Intention of the Parties.

Counsel for appellant argues that the testimony of her only witness shows the intention of the parties. For example at page 9 of appellant's brief it is stated that:

> "At the insistence of the lessees and for their protection, the parties agreed to subdivide the parcel into lots 1 and 2, and to divide the previously agreed annual rental of $4000 between the lots in the ration of 20% - 80%, or $800 for lot 1 and $3,200 for lot 2. The leases were entered into on such basis. Hence the intention of the parties, as evidenced by these negotiations * * *."

It is respectfully submitted that there is no evidence in this case to justify any such statement. The lessees never insisted on anything, and furthermore, they being prospective tenants were in no position to insist on anything. And likewise there is no evidence that they had anything to do with how the rent was divided or that the subdivision was made for their protection. The evidence on this point is on page 25 of the Record as follows:

> "I'm just trying to get my train of thought. During that same period, these leases had been submitted to attorneys for the lessees, and from some place the suggestion came that they would not be very secure unless they had some direct control of the corner lot.
>
> "So then it was decided that the property would be divided and two different leases made, and the rental divided between the two properties. That was done. We secured a survey to locate where the house was * * *."

The witness said, "from some place the suggestion came that they would not be very secure," and that "it was decided that the property would be divided". He does not say who made the suggestion, nor who decided that the property would be divided. There is no evidence that he ever talked to the lessees about this nor that they had anything to do with how the rent was divided. When he says, that it was decided that the property would be divided, he means that it was decided by the appellant and the witness as the tenant had nothing to do with dividing the property.

In short the testimony of this witness tends only to show his own intention and little more. And it must be borne in mind that preliminary negotiations are deemed merged in the final agreement of the parties by

which they are bound. Van Ness vs The Mayor et al of the City of Washington, 4 Pet. 232, 285.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the judgment of the Court below be affirmed.

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